Supreme Court, U.S.
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No. 03-

IN THE
Supreme Court of the United States

CINEMARK USA, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAURA M. FRANZE
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, TX 75201
(214) 969-2800

Counsel for Petitioner

185540

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether a requirement, set forth in a construction standard promulgated under the Americans with Disabilities Act to ensure non-discriminatory access to newly built places of public accommodation, that wheelchair seating in assembly areas afford "lines of sight comparable" to those for members of the general public is satisfied in movie theaters by wheelchair seating that provides an unobstructed view of the screen from locations amidst or adjoining general public seating?

2. Whether courts must accord *Chevron*-level deference to an agency's after-the-fact interpretation of a regulation when that interpretation subjects regulated entities to retrospective liability for violations of newly articulated obligations, in contravention of Congress's intention that the regulation provide authoritative, prospective notice of regulatory obligations?

3. Whether an administrative agency, in administering a regulatory scheme that was designed by Congress to provide authoritative prospective guidance, can adopt and retroactively enforce a burdensome new interpretation of a regulation without following the notice and comment rulemaking procedures specified in the Administrative Procedure Act?

CORPORATE DISCLOSURE STATEMENT

Petitioner, Cinemark USA, Inc., is a privately-held corporation organized under the laws of the State of Texas.

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Petitioner, Cinemark USA, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 6, 2003.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio (Nugent, J.) granting summary judgment for Cinemark, styled *United States of America v. Cinemark USA, Inc.*, No. 1:99-CV-705, Mem. Op. & Order (N.D. Ohio Nov. 19, 2001), is reprinted in the Appendix to this Petition ("App.") at App. 31a. The opinion of the United States Court of Appeals for the Sixth Circuit reversing and remanding the district court's judgment is reported at *United States of America v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003), and is reprinted at App. 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 6, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (2000), the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), 28 C.F.R. pt. 36, app. A (2003), and the Texas Accessibility Standards ("TAS"), are set forth at App. 71a – 80a.

STATEMENT OF THE CASE

The Sixth Circuit's decision reversing the district court's summary judgment for Cinemark exacerbates an acknowledged conflict between the Fifth and Ninth Circuits and among several federal district courts across the country concerning the proper interpretation of a regulatory requirement contained in Section 4.33.3 of ADAAG regarding the placement of wheelchair seating in assembly areas. Moreover, the Sixth Circuit's decision deepens confusion concerning the scope of the DOJ's authority to regulate retroactively through enforcement in the guise of new "interpretations" of its own regulatory standards. Review

by this Court is necessary to resolve the circuit court conflict concerning Section 4.33.3 and to provide needed guidance on the broader administrative law issues posed by the manner in which the DOJ has chosen to establish and enforce new building code requirements under authority purportedly conferred by Title III of the ADA.

A. ADA Requirements For Newly Constructed Public Accommodations.

In enacting Title III of the ADA, Congress recognized that architects and builders required both advance notice and specific instruction as to how to provide persons with disabilities "full and equal enjoyment" of public accommodations. *See* 42 U.S.C. § 12206(a), App. 75a (the Attorney General must develop a plan, with the assistance of the Access Board, to assist covered entities "in understanding the responsibilities of such entities . . . under this chapter"). Under this statutory scheme, new facilities designed and constructed for first occupancy more than thirty months after July 26, 1990 must meet the "requirements of [subsection 12182(a)]" unless it is "structurally impractical" to do so. *Id.* § 12183(a)(1), App. 71a. The law provides severe sanctions for violations of the new construction standards, including suits by the Attorney General for retrospective and prospective equitable relief, compensatory damages, and civil penalties. *Id.* § 12188(a)(2), (b)(2); 28 C.F.R. §§ 36.501(b), .503-.504.

Congress directed the Access Board to issue minimum guidelines within nine months of the ADA's enactment date (42 U.S.C. § 12204, App. 74a), and the Attorney General to issue regulatory standards "consistent with the minimum guidelines and requirements issued by the [Access Board]" within one year of that date. *Id.* § 12186(b)-(c), App. 72a. To provide authoritative standards for construction projects that were moving forward while the Access Board was developing the new construction standards, Congress also identified default standards upon which regulated parties could place immediate reliance. *Id.* § 12186(d), App. 72a-73a. Additional assistance to regulated entities was assured by a requirement that the DOJ

provide "appropriate technical assistance manuals to individuals and entities with rights or duties" under the Act. *Id.* § 12206(c)(3).

On July 26, 1991, following notice and a six-month public comment process during which it held fourteen public hearings, took testimony from 450 witnesses, received 1,865 written comments, and considered over 12,000 pages of material, the Access Board issued the new construction guidelines required by the ADA. The resulting regulations, called the ADAAG, are minutely detailed and precise, and essentially define "accessibility" under Title III of the ADA. *See, e.g.*, 56 Fed. Reg. 35,408 (July 26, 1991); 28 C.F.R. pt. 36, app. A (2003). On that same day, the DOJ issued regulations that adopted the ADAAG verbatim as legally binding new construction standards. *See* 56 Fed. Reg. 35,544, 35,585-86 (July 26, 1991); 28 C.F.R. 36.406(a).

B. Section 4.33.3 Of ADAAG.

Section 4.33.3 of ADAAG sets forth accessibility guidelines for "assembly" seating. It provides, in relevant part, as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as means of egress in case of emergency. . . . When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. . . .
>
> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than five percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. pt. 36, app. A at § 4.33.3, App. 76a.[1]

1. As initially proposed by the Access Board, Section 4.33.3 included a requirement that "[w]heelchair areas . . . be dispersed (Cont'd)

C. Cinemark's Construction Of Stadium-Style Theaters Between 1995 And 1999.

In 1995, four years after the ADAAG was promulgated, one of Cinemark's competitors opened what is widely considered to be the first "stadium-style" movie theater in the United States. *See United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1095 (C.D. Cal. 2002); *United States v. Cinemark*, Mem. Op. & Order at 2, App. 32a. Stadium-style movie theaters use steps and risers to provide clear sightlines that cannot be obtained with traditional sloped floor designs. The stadium-style design was created to eliminate "obstructed view" problems that occur, for example, when a tall individual sits in front of a shorter person.[2] The tiered seating cannot be navigated safely by persons using wheelchairs.

D. The Texas Accessibility Standards.

In the State of Texas, public accommodations are subject to federal accessibility requirements under Title III of the ADA

(Cont'd)

throughout the seating area." 56 Fed. Reg. 2,296 at 2,380 (Jan. 22, 1991). During the comment period, however, "[m]otion picture theater owners pointed out that new movie theaters are typically a multiplex of small auditoriums [in which] each seat is situated to provide a clear line of sight to the screen." 56 Fed. Reg. at 35,440. The Access Board responded to this comment by revising its guideline to exempt assembly areas with 300 or fewer seats from the dispersal requirement. *Id.*

2. Prior to the popularization of stadium-style movie theaters, traditional movie theaters used combinations of sloping floors and staggered seating patterns to provide patrons with (sometimes less than clear) sightlines over, or between, other forward-sitting patrons. Wheelchair seating in traditional movie theaters was typically located at the rear of the auditorium, near the entrance, due to accessibility regulations that required wheelchair spaces to be located, for safety reasons, on a level surface with accessible egress. The ADA regulations themselves may have contributed to the impetus for stadium-style designs, or at least stepped designs. Because the ADAAG so severely limited the slope of floors in places where wheelchairs must manuever, as well as for ramps, sightline issues over forward sitting patrons would be more difficult to solve without the use of steps. *See generally* ADAAG §§ 4.3, 4.5, 4.8.

and the ADAAG, and state accessibility requirements under the TAS.[3] On September 23, 1996, the DOJ certified the TAS pursuant to 28 C.F.R. § 36.602 as "meeting or exceeding" federal accessibility requirements. *See* 61 Fed. Reg. 51,719 (Oct. 3, 1996).[4] The DOJ publicly encouraged all builders in Texas to rely upon state and local approvals of their compliance with TAS, and on the DOJ's certification of TAS as "meeting or exceeding" federal ADAAG standards, when designing and building public facilities, stating as follows:

> Builders in Texas who follow state building codes can be assured that they are complying with federal guidelines as well, now that the Justice Department has certified Texas codes as being in compliance with the Americans with Disabilities Act. . . . "*Everyone in the State of Texas – builders, architects, business owners, and the general public – will benefit from Texas's new accessibility standards*". . . . "*Certification makes it easy to comply with the law.*" . . . Builders will benefit from this new process because it ensures that construction which meets

3. The TAS was drafted to closely follow the ADAAG, and contains, among other things, a "Section 4.33.3" entitled "Placement of Wheelchair Locations" that is modeled after, and is substantially similar to, the language in ADAAG Section 4.33.3, also entitled "Placement of Wheelchair Locations." *Compare* ADAAG § 4.33.3, App. 76a (requiring "lines of sight comparable to those for members of the general public") *with* TAS § 4.33.3, App. 80a (requiring "lines of sight comparable to those for other members of the audience").

4. In addition to instructing the DOJ to promulgate detailed specifications governing accessibility in new construction, the Act authorizes state and local governments to apply to the Attorney General for certification that their building codes impose accessibility standards that "meet[ ] or exceed[ ] the minimum requirements of [the ADA] for the accessibility and usability of covered facilities." 42 U.S.C. § 12188(b)(1)(A)(ii). Attorney General certification under this provision supplies "rebuttable evidence" in any Title III enforcement action that the certified law or ordinance "does meet or exceed the minimum requirements of this chapter." *Id.*

> state codes meets the requirements of the ADA. Builders will also have additional legal protection in ADA lawsuits if they build in compliance with the certified code.

App. 83a. In "Certification of State and Local Building Codes," another DOJ publication, the DOJ stated as follows:

> Code certification . . . allows builders to rely on their local inspection and approval processes, and it ensures that accessibility will be routinely considered in those processes. It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA.

App. 84a. It is uncontested that Cinemark built in compliance with the DOJ-certified TAS and that Cinemark's stadium-style movie theater multiplexes across the State of Texas received both pre- and post-construction TAS approvals, including express TAS § 4.33.3 approvals of wheelchair seating locations.

E. The DOJ's July 1998 "Interpretation" That Section 4.33.3 Imposes A Previously Unarticulated Viewing Angle Requirement And Its Subsequent Campaign Of Litigation Against The Movie Theater Industry.

Prior to July 1998, formal DOJ pronouncements concerning "lines of sight" focused solely on proving clear or comparably clear views.[5] Angle of view was considered to

5. *See Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 736-37 (3d Cir. 1999) (Section 4.33.3 did not address issue of lines of sight over standing spectator, and DOJ's interpretation requiring unobstructed lines of sight over standing spectators, as set forth in Technical Assistance Manual, not entitled to deference); *Paralyzed* (Cont'd)

be a dispersal issue, not a sightline issue.[6] Under Section 4.33.3, dispersal is not required where the venue provides 300 seats or less. App. 76a.

Despite an affirmative obligation to do so, the DOJ did not provide guidance concerning any possible difference in application of Section 4.33.3 to stadium-style movie theaters, as opposed to traditional theaters. As late as March 1998, in

(Cont'd)

Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 583 (D.C. Cir. 1997) ("We think the language 'lines of sight comparable' quite naturally is interpreted to refer to the ability of a wheelchair user to see a performance without any obstruction.").

6. *See*, for example, the DOJ's published technical assistance bulletin on "Accessible Stadiums," published prior to the DOJ's *Lara amicus* brief, in which the DOJ treats the line of sight requirement as wholly independent of any angle of "view" requirement.

> *Whenever more than 300 seats are provided, wheelchair seating locations must be provided in more than one location.* This is known as dispersed seating. Wheelchair seating locations must be dispersed throughout all seating areas and provide a choice of admission prices and views comparable to those for the general public.
>
> * * * * *
>
> *Wheelchair seating locations must provide lines of sight comparable to those provided to other spectators.* In stadiums where spectators can be expected to stand during the show or event (for example, football, baseball, basketball games, or rock concerts), all or substantially all of the wheel-chair seating locations must provide a line of sight over standing spectators. A comparable line of sight, as illustrated in the figure below, allows a person using a wheelchair to see the playing surface between the heads and over the shoulders of the persons standing in the row immediately in front and over the heads of the persons standing two rows in front.

DOJ, Civil Rights Division, Accessible Stadiums, May 1996, *available at* http://www.usdoj.gov/crt/ada/stadium.pdf, App. at 145a-146a (emphasis in original); *see also Indep. Living Res.*, 982 F. Supp. at 708 n.9; *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs*, 950 F. Supp. 389, 391-92 (D.D.C. 1996).

response to specific requests from Cinemark for assistance regarding both existing theaters and prospective construction, DOJ representatives failed to inform Cinemark that Section 4.33.3 required consideration of "viewing angles" in small venues. Instead, the DOJ maintained that it had taken no position regarding a viewing angle requirement. In tacit admission that no such requirement existed at that time, the DOJ implied that it was considering what position to take via investigation. App. 87a-88a.[7]

In July 1998, the DOJ announced its new position, not in the form of helpful guidance to the industry, but in the form of an *amicus curiae* brief. In *Lara v. Cinemark*, the DOJ simultaneously announced its new standard *and* urged retroactive application of the new standard to existing construction. *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000). As the DOJ admitted in oral argument before the Sixth Circuit, its *Lara amicus* brief represented the agency's first public pronouncement that it "interpreted" Section 4.33.3's "lines of sight comparable" language to encompass a "viewing angle" requirement in small venues. *See United States v. Cinemark*, 348 F.3d at 583 n.10, App. 25a. The DOJ argued that its "interpretation" was deserving of deference under *Auer*.[8]

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7. Other movie theater companies apparently had similar expeiences. *See, e.g.*, Hoyts Cinemas *Amicus Curiae* Brief filed in Support of Petitioner Regal Cinemas, Inc., No. 03-641, at 9-10, App. 100a-101a (discussing a DOJ architect's "Helpline" telephone advice that wheelchair seating located on the flat, front section of a proposed stadium-style movie theater would comply with Section 4.33.3). Also, in March 1997, during a presentation to theater owners on new construction standards, a DOJ representative explicitly refused to take a position as to what Section 4.33.3 required as applied to stadium-style movie theaters. *See AMC*, 232 F. Supp. 2d at 1105 & n.15.

8. In this earliest manifestation of its interpretation, the DOJ required wheelchair seating locations in stadium-style movie theaters to provide lines of sight within the "range" of viewing angles offered to "most" of the general public, adjusted for tilt, from tiered stadium-style seats, and further opined, by reference to a now defunct private (Cont'd)

How the DOJ arrived at its position, whether the position was the result of thoughtful review, what factors were considered, and whether high level policy makers were even involved in the interpretation remain unanswered questions. The DOJ has successfully resisted discovery of any record of its *de facto* rulemaking by claiming, among other things, deliberative privilege. App. 93a-97a.

Notably, as of July 1998, the DOJ did not contend that its position was based on any earlier interpretation of the regulation. Nor did the DOJ refer to any prior interpretation of the Access Board. In fact, the DOJ later conceded that no prior interpretation supporting its position existed. *See* Brief in Opposition to Cinemark's Motion for Summary Judgment, App. 98a-99a; *see also United States v. Cinemark*, 348 F.3d at 583 n.10, App. 25a (documenting the DOJ's concession at oral argument). Soon after submission of the *Lara amicus* brief, the DOJ filed lawsuits against several national movie theater companies, including AMC, Hoyts Cinemas, National Amusements, and Sanborn Theaters, based on various "viewing angle" interpretations of Section 4.33.3. At the same time, the DOJ made additional *amicus curiae* appearances advancing variations of its "viewing angle" interpretation in private plaintiff lawsuits against national movie theater companies Regal, Cinemark, and Hoyts Cinemas.

F. The Access Board's 1999 Notice Of Proposed Rulemaking For Section 4.33.3.

On November 16, 1999, the Access Board published a Notice of Proposed Rulemaking concerning several proposed ADAAG revisions. *See* 64 Fed. Reg. 62,248 (Nov. 16, 1999), App. 77a. As part of that process, the Access Board discussed possible revisions to Section 4.33.3, and remarked that it was aware that the DOJ had asserted in litigation that Section 4.33.3 imposed certain "viewing angle" requirements. The Access

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(Cont'd)
engineering group publication, that any viewing angle in excess of 35 degrees would exceed a quantitative anthropomorphic "discomfort threshold." App. 89a-91a.

Board stated that it was "*considering* whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of [Section] 4.33.3 to stadium-style movie theaters" *Id.*, App. 79a (emphasis added).[9]

G. The District Court Ruling Below, The Fifth Circuit's *Lara* Decision, And The Appellate Court Ruling Below.

In *Cinemark USA, Inc. v. United States Department of Justice*, No. 3:99 CV-0183M, 2000 WL 915091, at *7 (N.D. Tex. July 6, 2000), the DOJ successfully avoided judicial review of its interpretation of Section 4.33.3 on APA ripeness grounds by claiming that the interpretation was not "final," did not represent the agency's considered judgment, and did not have

9. In April 2002, the Access Board issued draft revisions to ADAAG that included proposed changes to the language of Section 4.33.3. *See* Draft Final ADA and ABA Accessibility Guidelines, April 2, 2002, App. 81a-82a. While it is clear that the Access Board has been actively considering alternatives with regard to potentially amending Section 4.33.3, it is premature to speculate on the content of a final rule. Nor would the Access Board have the final word on regulations concerning private facilities doing business as places of public accommodation (as opposed to federal funded buildings). Unlike the Access Board, the DOJ has not even started the rulemaking process and the DOJ has yet to propose any change to the regulatory language. Far from indicating any intention to resolve the pending controversy by formal rulemaking, the DOJ has denied an industry petition for rulemaking and ignored repeated admonishments by federal courts that it ought to have introduced its interpretation of Section 4.33.3 through notice and comment rulemaking. *See United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 93 (D. Mass. 2003) ("the Cinemas are not entirely wrong to castigate the Government for engaging in judicial legislation . . . [a]s matter of policy, the executive should be discouraged from attempting to get the courts do for it what it ought do for itself through the rulemaking process"); *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293, 1298 n.2 (D. Or. 2001) ("the vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather than through an interpretative rule"); NATO *Amici Curiae* Brief Filed in Support of Petitioner Regal Cinemas, Inc., No. 03-641, at 3, App. 124a-144a (discussing the DOJ's denial of NATO's formal petition for rulemaking on Section 4.33.3).

the force of law. *See* Defendant's Memorandum in Support of Motion to Dismiss, App. 92a. A short time later, the DOJ was relying on its interpretation of Section 4.33.3 as the basis for nationwide enforcement actions against Cinemark, AMC, and others. In March of 1999, the DOJ filed suit against Cinemark, alleging that the wheelchair seating locations in Cinemark's stadium-style movie theaters failed to provide comfortable "viewing angles" allegedly required under Section 4.33.3 and therefore violated the ADA as a matter of law. The DOJ sought retroactive relief that would require Cinemark to retrofit, at tremendous expense, its existing stadium-style movie theaters, and pay civil penalties and compensatory damages to an unspecified number of disabled movie patrons.

On April 6, 2000, the Fifth Circuit issued its decision in *Lara v. Cinemark*, holding that wheelchair seating locations in stadium-style movie theaters that provide unobstructed views of the movie screen comply with the "lines of sight comparable" language of Section 4.33.3. *Lara*, 207 F.3d at 783.[10] The Fifth Circuit reasoned that the text of Section 4.33.3 does not clearly contain a "viewing angle" requirement, that concerns about "viewing angle" did not even arise until well after Section 4.33.3 had been promulgated, that the common meaning of "lines of sight comparable" refers to unobstructed views and not "viewing angles," and that the Access Board had expressly recognized in 1999 that additional language was necessary to codify any alleged "viewing angle" requirement. *Id.* at 788-89. The Fifth Circuit considered and rejected the DOJ's "litigating position" concerning Section 4.33.3. *Id.*

Despite the Fifth Circuit ruling with regard to Cinemark, the DOJ continued to maintain its nationwide enforcement action

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10. The Fifth Circuit found it significant that all wheelchair seating at Cinemark's stadium-style movie theaters was located "amidst general public seating." *See Lara*, 207 F.3d at 789; *accord United States v. Cinemark USA, Inc.*, Mem. Op. & Order at 18, App. 53a (granting summary judgment as to all stadium-style movie theaters where the wheelchair seating provides an unobstructed view of the movie screen and is located amidst or adjacent to seating for the general public).

against the theater chain, even as to theaters within the Fifth Circuit, including the very theater that was the subject of the *Lara* litigation. In December of 2000, both DOJ and Cinemark filed motions for summary judgment. On November 19, 2001, the district court granted Cinemark's motion for summary judgment, denied the DOJ's motion for summary judgment, and entered final judgment for Cinemark. *United States v. Cinemark USA, Inc.*, Mem. Op. & Order at 19, App. 53a. The court stated that "the government has not persuaded the Court that either the DOJ or the Access Board intended Section 4.33.3 to encompass viewing angle." *United States v. Cinemark USA, Inc.*, Mem. Op. & Order at 11, App. 43a. Like the Fifth Circuit before it, the district court found the comments by the Access Board in its 1999 Notice of Proposed Rulemaking to be "particularly significant," concluding that they evidenced "that the DOJ's position with respect to Cinemark's stadium style theaters is not embodied in current Section 4.33.3." *Id.* at 11, 13, App. 43a, 46a. The DOJ appealed.

The district court decision was reversed by *United States v. Cinemark*, 348 F.3d 569 (6th Cir. 2003). The Sixth Circuit expressly disagreed with the Fifth Circuit, characterized the Fifth Circuit's analysis as "not persuasive," and deferred to the DOJ's interpretation. *United States v. Cinemark*, 348 F.3d at 577, App. 13a. The Court also opined that the agency was entitled to give new context to Section 4.33.3 through adjudication, rather than APA notice and comment rulemaking. *Id.* at 579-81, App. 20a-22a.[11]

11. While the Sixth Circuit was plainly troubled by the DOJ's attempt to circumvent the Fifth Circuit's *Lara* decision by seeking to enforce its "viewing angle" interpretation within the Fifth Circuit, the court ultimately sidestepped the issue by relying on the DOJ's belated concession that "it would not make any demands with regard to Cinemark's theaters that are within the Fifth Circuit until such a time as the law may change within that circuit." Therefore, the Sixth Circuit concluded, "we need not address this issue at the present time." *Id.* at 584, App. 30a. For Cinemark, the Sixth Circuit's reliance on the DOJ's expedient and conveniently timed representation rings hollow. Given (Cont'd)

REASONS FOR GRANTING THE PETITION

The DOJ's campaign to add, via litigation, an indeterminate requirement of viewing angle parity to the ADA-based construction standards for stadium-style movie theaters has produced disarray in the lower courts on three issues of broad significance: (1) what does Section 4.33.3 of the DOJ's new construction regulations reasonably require with respect to the placement of wheelchair seating in stadium-style theaters; (2) must courts defer to agencies' *post hoc* elaborations of vague regulatory standards, announced in litigation, where such retrospective standard setting subverts Congress's clear intention to prevent the economic waste and disincentives to investment associated with such *post hoc* regulatory action; and (3) can an agency, in administering a regulatory program that Congress designed to provide authoritative guidance in advance, adopt and retroactively enforce a burdensome new interpretation of a regulation without following the notice and comment procedures set forth in the APA? The Sixth Circuit's decision in this case adds to the prevailing confusion on each of these issues and exacerbates an acknowledged conflict in the circuits.

The same stadium-style movie theater design that was approved as compliant with federal accessibility regulations by the Fifth Circuit has been declared "undecided" in the Sixth Circuit and unlawful in the Ninth Circuit. There is no indication that this recurring conflict will end anytime soon, as evidenced by the fact that the DOJ and private litigants continue to prosecute numerous lawsuits against major movie theater companies in federal courts across the country. Moreover, neither the DOJ nor the federal judiciary has provided builders with

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the DOJ's agressive and tactical campaign, which included extensive discovery on stadium-style movie theaters located in the Fifth Circuit and repeated refusals to dismiss claims asserted as to those theaters, and the last minute nature of the agency's "concession" to the Sixth Circuit, the theater companies, including Cinemark, may understandably suspect that the DOJ representation is neither genuine nor effectively enforceable by the Sixth Circuit.

any clear explanation of how they failed to build lawfully in the first place, or given notice of clear and precise standards with for future construction.

If the Sixth Circuit's decision is permitted to stand, virtually all commercial construction projects will be subject to post-construction second-guessing. Worse still, no one can credibly assert that design requirements will not undergo further agency modification via litigation and without notice. On an even broader basis, this case implicates the rights of the regulated public under a wide variety of regulations and agency pronouncements. By combining *amicus* briefs and enforcement litigation with offensive use of judicial deference doctrines, a federal agency has free hand to modify law, exempt from effective review, and without restraint of the APA, in a way never contemplated by Congress.[12]

A. The Sixth Circuit's Ruling Exacerbates A Split In The Circuits On The Meaning Of Section 4.33.3 That This Court Should Resolve.

Judicial application of Section 4.33.3 since August 1998 has charted a course of increasing inconsistency and uncertainty. In *Lara*, the Fifth Circuit construed Section 4.33.3's line-of-sight comparability standard to require an unobstructed view of the movie screen from a location "amidst general public seating." *Lara*, 207 F.3d at 788-89. The Fifth Circuit found that regulations concerned with "lines of sight" were commonly understood to address freedom from obstructions, and that Section 4.33.3 should not be interpreted differently. *Id.* at 788. "To impose a viewing angle requirement at this juncture," the Fifth Circuit found, "would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers," in contravention of Congress's intent that "owners and operators of places

12. This Court generally declines to review appeals court decisions remanding cases for further proceedings in district court. However, for reasons set forth in Section D, *infra*, the considerations of judicial economy that support this general practice should not be determinative here.

of public accommodation be given clear guidelines for accommodating disabled patrons." *Id.* at 789. The reasoning of the Fifth Circuit's decision in *Lara* was analyzed and followed by district courts in this case (App. 43a-45a) and in *OPVA*, 142 F. Supp. 2d at 1297.

In *Stewmon*, a divided panel of the Ninth Circuit rejected the Fifth Circuit's analysis in *Lara*. *See Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), *rev'g OPVA v. Regal*, 142 F. Supp. 2d 1293, *petition for cert. filed*, (U.S. October 27, 2003) (No. 03-641). The *Stewmon* majority began with the proposition that it owed "'substantial deference'" to the DOJ's interpretation of its own regulations. *Id.* at 1131 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). Applying this standard, the panel majority determined that the DOJ's interpretation of Section 4.33.3 was not "so inconsistent with the regulation as to preclude deference." *Id.* at 1131 (citing a now-rescinded private engineering society's guideline for theater construction).

Judge Kleinfeld dissented in *Stewmon*, criticizing the panel majority for creating a "conflict with the Fifth Circuit" and embracing an "unreasonable construction" of Section 4.33.3 that put "theater owners in a position of impossible uncertainty as to what they must do to comply with the law." *Id.* at 1133 (Kleinfeld, J., dissenting). Judge Kleinfeld found that the integral placement and companion seating clauses of Section 4.33.3 provided effective checks against segregation of wheelchair seating, and that the imposition of additional requirements based on subjective comparisons of viewing angles was unsupported by the text and administrative history of the rule. *Id.* at 1136-37.

The Sixth Circuit's decision in this case adds to the prevailing confusion concerning the meaning of Section 4.33.3, and to the enormous uncertainty faced by the movie theater industry. Like the *Stewmon* majority, the Sixth Circuit panel found support for its ruling in cases affording judicial deference to agency regulatory interpretations, which the panel read to require that the DOJ's interpretation "be upheld unless

it is 'plainly erroneous or inconsistent with the regulation.'" *Id.* at 578, App. 16a (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

The confusion over how to interpret Section 4.33.3 has implications that go well beyond this particular regulation and statute. The interpretative confusion is rooted in confusion over application of the judicial deference doctrines to agency litigating positions. *See* Section B, *infra*. By deferring to a government agency litigating position on Section 4.33.3 under the circumstances here, the Sixth and Ninth Circuits stand in stark conflict with other cases presenting similar circumstances in which courts have refused to give any deference, or accorded little deference, particularly with regard to briefing positions not clearly supported by agency policymakers, as opposed to trial lawyers. In *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999), the Fifth Circuit expressly held that an agency legal brief was not entitled to deference. In a particularly detailed analysis, the Seventh Circuit declined to defer to an agency's litigation position purporting to interpret its own regulation in *Hoctor v. United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996). Similarly, in *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557, 563 (7th Cir. 1999), the Seventh Circuit accorded little deference to an agency's *amicus* brief. In *Akzo Nobel Salt, Inc. v. Federal Mine Safety & Health Review Commission*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000), the D.C. Circuit commented that litigating positions may not reflect fair and considered judgment of agency. *See also Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998); *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997). The conflict in the circuits seems to be rooted in how the lower courts reconcile *Auer v. Robbins*, 519 U.S. 452 (1997), with other pronouncements of this Court, including *Christensen v. Harris County*, 529 U.S. 576 (2000). As explained in a recent Seventh Circuit decision:

> The government's interpretation of the scope of our review is not saved by *Chevron U.S.A., Inc. v.*

> *Natural Resources Defense Council, Inc.* because it is found only in a brief, and briefs, it seems, get limited deference. Our hedge ("it seems") is because *Auer v. Robbins* gave full *Chevron* deference to an agency's *amicus curiae* brief; yet in the *Christensen* case the Supreme Court stated flatly that "interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack of the force of law – do not warrant *Chevron*-style deference." Briefs certainly don't have "the force of law.". . . Probably there is little left of *Auer*. . . . It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.

Keys v. Barnhart, 347 F.3d 990, 993-94 (7th Cir. 2003) (citations omitted). Based on the number of lower courts that have struggled with the judicial deference doctrines as applied to agency pronouncements made via lower level amicus briefing, it is clear that this issue of deference is recurring and deserves this Court's attention.

B. The Sixth Circuit's Decision Overlooks Fundamental Limitations On Judicial Deference To Agencies' Interpretations Of Their Own Regulations.

The Sixth Circuit's view that it was required to defer to DOJ's interpretation of Section 4.33.3 unless it found that interpretation to be "'plainly erroneous or inconsistent with the regulation,'" 348 F.3d at 578, App. 16a (quoting *Auer*, 519 U.S. at 461), reflects a fundamental misapprehension of the basis for and scope of judicial deference to agencies' interpretations of their own regulations. Under principles first elaborated in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), judicial deference to agencies' interpretations of their own

regulations – like judicial deference to agencies' interpretations of their authorizing statutes (*see Chevron USA, Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984)) – derives from a general inference concerning unstated congressional intentions. "Because applying an agency's regulations to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, [the courts] presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991).

In this case, both the manner in which DOJ has propounded the regulatory interpretation for which it claims deference and the content of that interpretation require critical examination. As an initial matter, it is far from clear that the DOJ's authority to promulgate new construction regulations carries with it the right to propound authoritative interpretations of those regulations in legal briefs. In *Auer*, this Court extended *Seminole Rock* deference to the Secretary of Labor's interpretation of a wage standard regulation set forth in the Secretary's *amicus* brief to this Court. *See Auer*, 519 U.S. at 462 (finding that the brief was not a "'*post hoc* rationalizatio[n]' advanced . . . to defend past agency action against attack," and that there was no other reason to suspect that the brief failed to "reflect the Secretary's fair and considered judgment on the matter") (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)). In more recent decisions, however, the Court has stated that "*Chevron*-style deference" is not warranted for agency interpretations of statutes propounded in agency issuances that "lack the force of law," *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing "policy statements, agency manuals, and enforcement guidelines"), and confirmed that briefs fall within this category, *see United States v. Mead Corp.*, 533 U.S. 218, 238 n.19 (2001).[13]

13. Moreover, the DOJ's tactics here stand in stark contrast to the agency conduct meriting deference in *Auer*. In *Auer*, the Court asked for (Cont'd)

While *Christensen* and *Mead* do not directly challenge *Auer*, their logic casts considerable doubt on its continuing vitality. Agencies' implied powers to provide authoritative interpretations of their own regulations could, in theory, be significantly less constrained than their implied powers to provide authoritative interpretations of their authorizing statutes. But if, as *Christensen* and *Mead* instruct, a congressional grant of general administrative powers does not enable an agency to propound authoritative statutory interpretations through actions short of rulemaking or formal adjudication, it is difficult to see why a grant of rulemaking power should enable an agency to propound authoritative regulatory interpretations in any fashion it chooses. Such a disparity, as Justice Scalia has pointed out, would strongly encourage agencies "to rush out barebones ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect." *See Mead*, 533 U.S. at 246 (Scalia, J., dissenting); *see also Keys*, 347 F.3d at 993-94.

The substantive effect of the DOJ's current exercise in regulatory interpretation raises a much greater obstacle to its claim of *Seminole Rock* deference. This Court has declined to apply *Seminole Rock*'s presumption of interpretive authority where deference to a regulatory interpretation would subvert an established statutory scheme. In *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994), this Court refused to defer to the "true doubt rule," under which the Department of Labor shifted the burden of persuasion to parties opposing certain benefits claims. The government argued that this rule represented a permissible agency interpretation of an ambiguous regulation

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an agency's interpretation of a regulation, which was then provided. *See Auer*, 519 U.S. at 461. Here, no court asked for the DOJ's opinion. Rather, the DOJ deliberately set out to create and impose a new viewing angle requirement by litigation.

giving black lung claimants "'the benefit of all reasonable doubt" and that judicial deference was owed under *Seminole Rock*. *Id.* at 271 (quoting 20 C.F.R. § 718.3(c) (1993)). However, this Court ruled that the true doubt rule conflicted with section 7(c) of the APA, and that even if the Department of Labor was statutorily authorized "to displace section 7(c) through regulation," its interpretation of an "ambiguous regulation" giving miners the benefit of reasonable doubt could not "overcome the presumption" that the benefits adjudications at issue were "subject to § 7(c)'s burden of proof provision." *Id.* The Department of Labor's presumed authority to interpret its own regulations could not sustain its attempt to create, through interpretation of an ambiguous rule, an exemption from a fundamental background rule of administrative adjudications.[14]

Seminole Rock deference is equally inappropriate here. In establishing the Title III requirements for privately operated public accommodations and commercial facilities, Congress drew a fundamental distinction between preexisting and newly constructed facilities. Congress required the removal of architectural barriers in pre-existing facilities only where "such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). Congress established far more exacting requirements for new construction, *id.* § 12183(a)(1), but went to great lengths to ensure the provision of adequate advance notice of those requirements to designers, builders, and owners of public accommodations. Recognizing that the costs of redesign and reconstruction vastly exceed the costs of building to properly specified standards in the first instance, and that retroactive specifications would be both wasteful and unfair, Congress crafted the ADA's new construction provisions to avoid such

14. *Cf. FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (in applying *Chevron*, a "court should not confine itself to examining a particular statutory provision in isolation," but consider the statutory scheme as a whole and employ "a degree of common sense as to the manner in which Congress is likely to delegate a policy decision of [great] economic magnitude to an administrative agency").

waste and unfairness. Congress declined to authorize direct enforcement of a general statutory standard for accessibility of new construction, providing instead for the enforcement of regulatory standards devised to ensure accessibility. Moreover, statutory deadlines for the promulgation and publication of regulations and related technical assistance manuals were set to ensure that this guidance would be available before the new construction obligations took effect. *See id.* §§ 12186(b)-(c), 12204(a), App. 72a, 74a. In short, the structure of Title III and many of its critical terms demonstrates Congress's determination to ensure that parties contemplating construction of new facilities would have timely access to authoritative descriptions of their Title III obligations.[15]

The implications of Title III's emphasis on clear delineation of new construction standards were recognized in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). The plaintiffs in that case sought *Seminole Rock* deference for the DOJ's interpretation, articulated in an *amicus* brief, of certain Technical Assistance Manual provisions concerning Section 4.33.3. The D.C. Circuit noted that the DOJ's effort to add new content to the provisions of the manual after construction had been completed ran counter to Title III's insistence on authoritative prospective guidance, and expressed doubt that *Seminole Rock* deference could overcome this contradiction:

> Although there are circumstances in which a federal court may accept an agency's interpretation of a statute or regulation set forth only in an *amicus* brief, it is not clear here that the Department, which has the authority and duty to issue technical assistance manuals interpreting and applying its regulation, can

15. The illogic of judicial deference to the retroactive imposition of construction standards under this scheme is underscored by DOJ's clear lack of authority to accomplish the same result through notice and comment rulemaking. *See Bowen*, 488 U.S. at 208-09 ("Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.").

> further add to its interpretation in litigation – and get deference to that marginally additional interpretation.

Id. at 589 (internal citations omitted). Although *D.C. Arena* ultimately relied on other reasons to reject DOJ's attempt to add to the requirements at issue through "interpretation," its doubts concerning the DOJ's claim to *Seminole Rock* deference for retroactive "interpretations" of the new construction rules were well founded. Where Congress goes to great lengths to provide clear prospective guidance to regulated entities in order to avoid the inefficiency and unfairness of *post hoc* legal change, as it did in the new construction provisions of the ADA, the ordinary presumption that rulemaking agencies are empowered to make policy through regulatory interpretation does not properly apply.

Other aspects of the DOJ's campaign to set viewing angle standards through "interpretation" of Section 4.33.3 reinforce the conclusion that *Seminole Rock* deference is inappropriate here. This Court has declined to accord deference to agency regulatory interpretations that are not consistently applied. *See Bowen*, 488 U.S. at 212-13 (deference to agency litigation position "entirely inappropriate" where that position is not "reasoned and consistent"). Although the DOJ, since July 1998, has asserted that Section 4.33.3 requires some sort of qualitative comparison of viewing angles, its varied descriptions of the content of that qualitative comparison have fostered uncertainty for regulated entities.[16] In addition, there is substantial appellate

16. In July 1998, when the DOJ first announced that Section 4.33.3 imposed a viewing angle requirement, it asserted that line-of-sight comparability, as applied to stadium-style movie theaters, required a particular form of comparison. *See* Brief of *Amicus Curiae* United States on Summary Judgment Issues at 8, *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497, Civ. No. EP-97-CA-502-H (W.D. Tex. Aug. 21, 1998), App. 90a (asserting that wheelchair seating must provide viewing angles "within the range of viewing angles as those offered [sic] to most of the general public in the stadium style seats"). More recently, however, the (Cont'd)

authority that courts owe less deference to agency interpretations of their own regulations under *Seminole Rock* where a new interpretation expands liability for past conduct, as DOJ's interpretation of Section 4.33.3 clearly does here.[17]

In short, to determine whether the *Seminole Rock* presumption of interpretive authority applies, a court must advance beyond a text-bound examination of ambiguity and ranges of permissible interpretations to consider whether enforcement of the agency interpretation would subvert the purposes of the underlying grant of rulemaking authority. The Sixth Circuit bypassed this critical threshold inquiry. By failing to ask whether Congress can reasonably be understood to have

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DOJ has advocated more precise and demanding viewing angle standards. For example, its submissions during the district court phase of *United States v. Hoyts* included a report by a DOJ expert setting forth a multipart test for line-of-sight comparability in stadium-style movie theaters. The district court rejected this suggested "interpretation" of line-of-sight comparability under Section 4.33.3, ruling that the report's approach was "confusing, overlong and . . . absurdly demanding." *Hoyts*, 256 F. Supp. 2d at 87 & n.12; *see also* 64 Fed. Reg. at 62,278, App. 78a-79a (Access Board's description of DOJ position that wheelchair seats in stadium-style theaters must "provide viewing angles that are equivalent to or better than the viewing angles (including vertical, horizontal, and angle to the top of the screen) provided by 50 percent of the seats in the auditorium").

17. *See, e.g., Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25 (1st Cir. 2000) (although OSHA interpretation was reasonable and valid, it could not be applied in a penalty case because regulation itself provided inadequate notice of the standard newly elaborated standard); *Trinity Broadcasting v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) (plausible interpretation of FCC rule cannot serve as the basis for non-renewal of broadcast license where basis for this penalty was not "ascertainably certain" at the time of the alleged violation); *see generally* Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.11 (2003 & Supp. 2004) (arguing that "due process considerations" provide support for a two-tier approach to *Seminole Rock* under which agencies receive greater deference for interpretations that narrow eligibility for a benefit and for determinations that expand liability for penalties).

granted DOJ the power to specify new construction standards through "interpretations" of ambiguous regulations propounded in legal briefs, the Sixth Circuit panel in this case, like the Ninth Circuit majority in *Stewmon* and the district courts that have reached similar results, improperly allowed DOJ to subvert Congress's clear intention to preclude retroactive standard setting under the new construction provisions of the ADA. The misconception of *Seminole Rock* deference in these decisions poses a threat not only to defendants in stadium-style movie theater cases, but also to other regulated entities that Congress seeks to provide with authoritative, reliable guidance upon which to base major economic decisions. This Court should grant the petition for certiorari to correct this misguided approach.

C. The Sixth Circuit's Decision Disregards Limitations That The APA Places On Agency Discretion To Impose New Regulatory Obligations Without Following Notice And Comment Rulemaking Procedures.

The Sixth Circuit's deference to the DOJ in this case extends beyond its uncritical review of DOJ's interpretation of Section 4.33.3 under *Seminole Rock*. The court also deferred to DOJ's decision to establish this new interpretation through adjudication rather than through notice and comment rulemaking. The court ruled that the DOJ's choice between rulemaking and adjudication was committed to the Department's "'informed discretion,'" and that notice and comment procedures would not have been required in any event because the change was interpretive rather than legislative. *United States v. Cinemark*, 348 F.3d at 580 & n.8, App. 20a-21a (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974)). This second aspect of the Sixth Circuit's deference to the DOJ disregards essential limits on adjudicatory policymaking and retroactive rulemaking in a manner that threatens to distort administrative policymaking choices in settings far beyond the limits of the ADA.

Congress frequently empowers agencies to act both through adjudication and rulemaking, and "an agency to whom Congress grants [this] discretion may elect between rulemaking and

ad hoc adjudication to carry out its mandate." *Bell Aerospace*, 416 U.S. at 290-95; *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96-97 (1995). This Court has cautioned, however, that "there may be situations where [an agency's] reliance on adjudication would amount to an abuse of discretion or a violation of" its authorizing statute. *Bell Aerospace*, 416 U.S. at 294; *see also Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

One critical limitation on the use of adjudication to elaborate new administrative policy reflects the law's general hostility to retroactive lawmaking. There is a sense, of course, in which adjudication is inherently retroactive. *SEC v. Chenery*, 332 U.S. 194, 203 (1947). However, adjudication cannot properly be invoked to articulate and enforce legal obligations that could not reasonably have been known at the time of the conduct at issue. The validity of any particular exercise in adjudicatory standard setting depends on a balancing of interests: if the "mischief" that an agency seeks to combat through retroactive application of a new standard elaborated in an adjudicatory forum "is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." *Id.* In conducting the analysis that *Chenery* requires, courts of appeals have articulated a number of factors and formulas designed to assist in the weighing of the programmatic benefits of adjudicatory standard setting against unfairness to regulated entities. These decisions typically focus on factors such as the benefits and burdens that would result from retroactive application of the agency's newly articulated standard and the extent to which regulated entities reasonably relied on a contrary understanding of their obligations.[18]

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18. *See Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C.Cir.1972), *see also Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 n.4 (5th Cir. 1998) (surveying adoption of this and other standards); John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 670 n.281 (1996) (under fair notice doctrine, "enforcement of a novel regulatory construction, without sufficient notice, is *ipso facto* arbitrary and capricious").

DOJ's decision to set new construction standards by adjudication fails under any plausible version of the *Chenery* test. The DOJ has undertaken to establish a new requirement of viewing angle parity that is inconsistent with the text and administrative history of the regulation from which it ostensibly derives. The DOJ has taken this action against theater owners who relied – with strong encouragement from the DOJ – on state-approved theater designs that allegedly did not satisfy the agency's new standard. And it has done all this in the course of administering statutory provisions that were plainly designed to prevent such retrospective standard setting. Under *Chenery* and the cases that have applied it, DOJ's decision to propound a viewing angle parity requirement through adjudication rather than through notice and comment rulemaking represents a clear abuse of discretion.[19]

The Sixth Circuit's suggestion that DOJ could establish its standard by interpretive rather than legislative rule, thereby avoiding the notice and comment requirements of the APA, is also misplaced. In determining whether a rule is legislative, and therefore invalid unless adopted at the culmination of notice and comment proceedings, courts examine its substance rather than the label affixed by the agency. *See Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 619 (5th Cir. 1994). A rule is substantive

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19. One district court has ruled that DOJ's persistent refusal to "make itself more clear" by conducting a rulemaking to establish a viewing angle standard "argues strongly in favor of making the relief in this case [against stadium-style theater owners] prospective." *Hoyts*, 256 F. Supp. 2d at 92-93. But limiting the DOJ to prospective remedies in its section 4.33.3 adjudications cannot cure the APA problem. The retrospective character of adjudication is part of the APA taxonomy. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (invalidating purely prospective adjudication). "[J]ust as *Chenery* suggested that rulemaking was prospective, the opinions in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), suggested the obverse: that adjudication could not be purely prospective, since otherwise it would rulemaking." *Bowen*, 488 U.S. at 220-21 (Scalia, J., concurring); *see id.* (under the APA, "[a]djudication deals with what the law was; rulemaking deals with what the law will be").

if it "grants rights, imposes obligations, or produces significant effects on private interests" or "creates new law, rights, or duties." *Ohio Dep't of Human Servs. v. United States Dep't of Health & Human Servs.*, 862 F.2d 1228, 1232 (6th Cir. 1988). Interpretive rules, in contrast, "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Guernsey Mem'l Hosp.*, 514 U.S. at 99. The requirement of viewing angle parity is clearly substantive rather than interpretive under this authority. The APA requires that it be established, if at all, under notice-and-comment procedures.

The implications of the Sixth Circuit's ruling that DOJ is free to establish a new viewing angle standard through adjudication rather than through notice and comment rulemaking extend well beyond issues of basic fairness to the builders and owners of facilities subject to ADA accessibility standards. In *Bowen*, this Court imposed a salutary limit on retroactive rulemaking, holding that a grant of rulemaking power does not ordinarily include the power to promulgate retroactive rules "unless that power is conveyed in express terms." 488 U.S. at 208. In the absence of effective judicial enforcement of *Chenery's* restriction on the use of adjudication to set new standards, however, *Bowen* will merely replace retroactive rulmaking with efforts to obtain the same improper ends through adjudications designed to establish new standards rather than to apply existing ones.

D. The Issues Raised By This Case Are Important, Recurrent, And Properly Presented For Review By This Court.

The Sixth Circuit's decision in this case raises issues of critical importance for the movie theater industry specifically and for private parties subject to federal regulation generally. The Sixth Circuit has adopted an incorrect and unworkable approach to Section 4.33.3 that directly conflicts with the approach taken by other courts and should be overturned. Since announcing an entirely new approach to line-of-sight comparability in its July 1998 *amicus* brief in *Lara*, the DOJ has advocated, as plaintiff in a series of enforcement actions and as *amicus* in a series of parallel private suits, potentially

ruinous retrospective remedies against owners of stadium-style movie theaters based on alleged violations of previously unknown viewing angle requirements. The division of authority among the lower courts, which has forced the movie theater industry to operate in a state of complete uncertainty as to the legality of much of its basic infrastructure, warrants immediate review by this Court.

On a broader level, the Sixth Circuit adds to the prevailing confusion in the lower courts concerning judicial deference to an agency's interpretation of its own regulation and to an agency's decision to implement new policies retrospectively through the advocacy of novel regulatory interpretations in adjudications. The Sixth Circuit's reflexive deference to the DOJ's *post hoc* imposition of a viewing angle requirement for stadium-style theaters misapplies the *Seminole Rock* doctrine and subverts Congress's effort to establish a fair and workable regulatory regime for new construction standards under the ADA. Similarly, the Sixth Circuit's deference to the DOJ's decision to establish a viewing angle requirement through adjudication rather than rulemaking reflects an abdication of judicial responsibility – made critical by *Bowen*'s strict limitations on retroactive rulemaking – to protect regulated entities from unreasonable retroactive standard setting in adjudicatory settings. This decision, if allowed to stand unchecked, will invite future abuses of regulatory authority at the expense not only of movie theater companies and others who have constructed new facilities in reliance upon the ADA's ostensible protections against retroactive standard setting, but also of regulated entities in other industries that make long-term decisions in reliance on legislative protections against *post hoc* changes in regulatory standards.

Although this Court ordinarily declines to grant certiorari to review appeals court decisions remanding cases for further district court proceedings, *see Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967), the unusual circumstances of this case justify a departure from the usual practice. *Compare, e.g., Sch. Bd. of Nassau*

County v. Arline, 480 U.S. 273 (1987). Despite the lack of a final judgment in this case, the Sixth Circuit's views on the fundamental issues in dispute are clear. Moreover, there is no immediate prospect – apart from the possibility of action by this Court in a parallel case – that postponement of review will eliminate the need for this Court's guidance. In view of these circumstances, and the importance of the issues presented, the lack of a final judgment should not preclude a grant of certiorari.

Review of similar questions has been requested in *Regal Cinemas, Inc. v. Stewmon*, No. 03-641, in which the DOJ advocated its "interpretation" of Section 4.33.3 as *amicus* in support of the individual plaintiffs before the Ninth Circuit. Cinemark respectfully suggests that the Court grant review in both cases and consolidate them for disposition on the merits. Alternatively, Cinemark requests that the petition in this case be held pending disposition of the petition in *Stewmon* and then disposed of as appropriate in light of the Court's action in that case.

CONCLUSION

Characterizing the DOJ's position on Section 4.33.3 as an "interpretation" deserving of deference, as the Sixth Circuit did in *United States v. Cinemark*, is to perpetuate a particularly callous fiction. To maintain the fiction, one would have to conclude that thousands of movie theater multiplexes across the country were built improperly. One would have to believe that independent architects and design professionals, working for every major movie theater company, repeatedly and severely misinterpreted the same law. One would have to pretend that a multitude of neutral governmental building and licensing inspectors in separate states, including inspectors working to enforce accessibility codes certified by the DOJ as meeting or exceeding federal accessibility requirements, each independently "got it wrong." One would have to concede that an entire law-abiding industry simultaneously, pervasively, and consistently misapplied the same design requirement in the same disastrously mistaken way.

The DOJ's litigation campaign against the theater industry has created disarray in the lower courts on the issue of Section 4.33.3, and on broader issues of judicial deference and respect for Congresstional mandate. Congress intended that builders have ample notice of the requirements of Title III of the ADA and in no way sanctioned the creation of new obligations through revisionist interpretation announced via *amicus* brief.

If an administrative agency is permitted to modify regulations in the manner sanctioned by the Sixth and Ninth Circuits, the due process strictures of the APA mean little. If allowed to stand unchecked, the decision below, along with its Ninth Circuit counterpart, opens the door to abuse of regulatory authority at the expense of all regulated industries.

This case provides the Court with an occasion to rein in opportunistic, unsanctioned, and *de facto* agency legislative rulemaking. For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

LAURA M. FRANZE
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, TX 75201
(214) 969-2800

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AND FILED NOVEMBER 6, 2003

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 02-3100

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CINEMARK USA, INC.,

Defendant-Appellee.

Argued June 20, 2003
Decided and Filed Nov. 6, 2003

Before DAUGHTREY and ROGERS, Circuit Judges; QUIST, District Judge.*

OPINION

ROGERS, Circuit Judge.

The district court in this case granted summary judgment against the United States in its suit against Cinemark USA, Inc. (Cinemark) under Title III of the Americans with

* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

Disabilities Act (ADA). The government alleged that Cinemark has violated the ADA by designing, constructing, and operating stadium-style movie theaters in a manner that discriminates against wheelchair-using patrons. Specifically, the government argued that Cinemark was not complying with the applicable Justice Department regulation, ADAAG[1] § 4.33.3, which requires that "[w]heelchair areas shall be . . . provided so as to provide people with disabilities . . . lines of sight comparable to those for members of the general public." The district court held as a matter of law that Cinemark was in compliance because its theaters provided wheelchair patrons with unobstructed views of the movie screen from wheelchair seating located amid or adjacent to seating for the general public. The government correctly argues that the "line of sight" aspect of its regulation does not require merely that wheelchair users be provided unobstructed views of the movie screen, but instead requires *in addition* that the unobstructed views be "comparable" to those of other patrons. Accordingly, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

BACKGROUND

1. Cinemark's Stadium-style Theaters

Cinemark constructs, owns, and operates movie theaters throughout the United States. In 1995, Cinemark began constructing "stadium-style" movie theaters. Stadium-style

1. The Department of Justice's enabling regulations under the Americans with Disabilities Act are the Americans with Disabilities Act Accessibility Guidelines, commonly referred to as the "ADAAG."

theaters have a seating configuration that rises at a relatively steep grade,[2] typically making stadium-style sections of these theaters impossible to navigate by wheelchair-using patrons. In Cinemark's stadium-style theaters, wheelchair placements are generally located on a flat portion of the auditorium approximately one-third of the way back from the screen. This placement is in the third row of fixed seating, with two rows of general public seating in front, and near the entrances and exits to the theaters.[3] Wheelchair placements are also located on a flat portion in the rear of the auditorium in Cinemark's theaters that seat 300 or more people. These placements are accessed by elevators. Over 80 percent of the general seating in Cinemark's stadium-style theaters is located in the stadium section.

The government alleges that because of the placement of the wheelchair-accessible locations, wheelchair users are sometimes forced to look up at the screen at sharp angles, resulting in severe discomfort and pain. According to the government, these and similar problems have made Cinemark's stadium-style theaters effectively unusable by persons confined to wheelchairs.

2. *Title III of the ADA and the Justice Department's Regulation, ADAAG § 4.33.3*[4]

Disability-based discrimination in public accommodations is prohibited under Title III of the Americans with Disabilities

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2. This grade is often greater than 5%.

3. Cinemark stresses that this latter detail is of prime importance in the event of an emergency.

4. Also referred to as "Standard 4.33.3" or "§ 4.33.3."

Act, 42 U.S.C. § 12182. Title III generally requires that public accommodations designed and constructed "for first occupancy" after January 26, 1993,[5] be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a)(1). Cinemark's stadium-style movie theaters were built starting in 1995 and are therefore subject to Title III's requirements for new construction.

Congress gave the Attorney General the responsibility to promulgate regulations implementing the provisions of Title III of the ADA. *See* 42 U.S.C. § 12186(b). These regulations must be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board (the "Access Board"). *See* 42 U.S.C. § 12186(c). In 1991, the Department of Justice (the "DOJ") issued regulations, known as the Standards for Accessible Design, which incorporated the Americans with Disabilities Act Accessibility Guidelines ("ADAAG") promulgated by the Access Board. *See* 56 Fed.Reg. 35,546 (July 26, 1991); 28 C.F.R. 36.406(a); 28 C.F.R. Pt. 36, App. A. The ADAAG were promulgated under the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553 (1998).

This appeal concerns one of DOJ's regulations under Title III of the ADA, known variously as Standard 4.33.3 or ADAAG § 4.33.3. This regulation provides that in "assembly areas,"

> *Wheelchair areas* shall be an integral part of any fixed seating plan and *shall be provided so as to*

5. The language of the statute reads: "failure to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act [enacted July 26, 1990]."

> *provide* people with physical disabilities a choice of admission prices and *lines of sight comparable to those for members of the general public.* They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.
>
> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. Pt. 36, App. A, § 4.33.3 (emphasis added).

3. The DOJ's Certification of Local Accessibility Standards

The Department of Justice is authorized under Title III of the ADA to certify that state or local accessibility standards meet or exceed the ADA Standards for Accessible Design. The DOJ explained the advantages of this process in a publication on its website entitled "Certification of State and Local Building Codes":

> Code certification facilitates voluntary compliance by putting ADA requirements and local require-

> ments into a single, readily available document. It allows builders to rely on their local inspection and approval processes, and it ensures that accessibility will be routinely considered in those processes. It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA.

J.A. at 154. Certification serves as "rebuttable evidence" that a state law or local ordinance meets or exceeds the minimum requirements of the ADA in a later federal enforcement proceeding, *see* 42 U.S.C. § 12188(b)(1)(A)(ii), and compliance with a certified code is "rebuttable evidence" of compliance with Title III of the ADA.

The State of Texas has promulgated building codes related to requirements under Title III of the ADA, known as the Texas Accessibility Standards ("TAS"). The TAS were certified as meeting or exceeding federal accessibility requirements by the DOJ on September 23, 1996. Following this certification, the DOJ issued a press release which stated:

> Builders in Texas who follow state building codes can be assured that they are complying with federal guidelines as well, now that the Justice

> Department has certified Texas codes as being in compliance with the Americans with Disabilities Act. . . .
>
> "*Everyone in the state of Texas—builders, architects, business owners, and the general public—will benefit from Texas' new accessibility standards*" . . . . "*Certification makes it easier to comply with the law.*"
>
> . . . Builders will benefit from this new process because it ensures that construction which meets state codes meets the requirements of the ADA. Builders will also have additional legal protection in ADA lawsuits if they build in compliance with the certified code.

J.A. at 153. The TAS includes a "Section 4.33.3," which is modeled after the language of ADAAG § 4.33.3. Cinemark received certification of its compliance with TAS accessibility requirements for many of its stadium-style theaters built in Texas between 1995 and 1998. Cinemark relied upon this certification of compliance when designing and building its theaters in Texas and throughout the United States.

4. The Access Board's New Notice of Proposed Rulemaking

On November 16, 1999, the Access Board published a new Notice of Proposed Rulemaking in the Federal Register for public notice and comment. *See* 64 Fed.Reg. 62248, 62278 (1999). The notice proposed modifications to ADAAG § 4.33.3 not relevant here, but in a preamble to the proposed

revision, the Access Board noted that it was "aware" of DOJ attempts to enforce DOJ's interpretation of ADAAG § 4.33.3 through litigation, and stated that the Board was "considering whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters." *Id.* A new final rule has not yet been adopted.

5. Procedural History

On March 24, 1999, the government sued Cinemark in the United States District Court for the Northern District of Ohio, alleging that Cinemark had engaged in a pattern or practice of discrimination in violation of Title III of the ADA, 42 U.S.C. 12181 *et seq.*, and its implementing regulations. Specifically, the complaint alleged that many of Cinemark's stadium-style theaters throughout the United States failed to comply with ADAAG § 4.33.3, 28 C.F.R. Pt. 36, App. A, § 4.33.3. The government requested a declaratory judgment stating that Cinemark violated Title III of the ADA by designing, constructing, and operating stadium-style movie theaters in a manner that discriminates against wheelchair-using patrons. The government further requested that: (1) Cinemark be ordered to bring its present stadium-style movie theaters into compliance with Title III; (2) Cinemark be enjoined from designing or constructing additional stadium-style theaters unless such theaters are in compliance with Title III; (3) Cinemark be ordered to provide remedial relief, including compensatory damages, to all individuals with disabilities who were discriminated against by Cinemark in violation of Title III; and (4) Cinemark be assessed a civil penalty.

Appendix A

In December of 2000, Cinemark moved for summary judgment on all claims asserted by the government, contending that all of its stadium-style theaters complied with Title III of the ADA and ADAAG § 4.33.3. The government also moved for partial summary judgment on whether some of Cinemark's stadium-style theaters were in violation of ADAAG § 4.33.3. On November 19, 2001, the district court granted Cinemark's motion for summary judgment, denied the government's cross-motion, and entered final judgment for Cinemark. The district court held that, as a matter of law, Cinemark's stadium-style movie theaters complied with ADAAG § 4.33.3 because they provided patrons that use wheelchairs with unobstructed views of the movie screen from wheelchair seating located amidst or adjacent to seating for the general public, and this is all that was required under the plain language of that regulation.

ANALYSIS

1. Standard of Review

We review a district court's decision to grant summary judgment *de novo*. *Thomas v. United States*, 213 F.3d 927, 929 (6th Cir.2000). The moving party has the burden of establishing that there are no material factual disputes, and that it is entitled to judgment as a matter of law. *Id.* There are no factual disputes in the present appeal; therefore, resolution of this case depends on our determination of what is required under the plain meaning of ADAAG § 4.33.3 and whether the DOJ's interpretation of ADAAG § 4.33.3 is reasonable and entitled to deference as a matter of law. Because the plain meaning of ADAAG § 4.33.3 requires more

than merely unobstructed views of the movie screen, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion. The alternative grounds asserted by Cinemark, moreover, do not require affirmance of the district court's judgment.

2. *ADAAG § 4.33.3 Does Not Require Merely That Wheelchair-using Patrons Have Unobstructed Views of the Movie Screen*

The regulation at issue appears plainly to require that wheelchair patrons have something more than a merely unobstructed view in seating adjacent to other patrons. While we agree that "line of sight" can be defined as unobstructed view, the regulation requires more than "lines of sight" for wheelchair patrons. It requires *comparable* lines of sight. While the word "comparable" can mean "capable of being compared," such an interpretation would give the word no substantive content in this context. The other—obviously intended—meaning of "comparable" is "similar." Thus, in ordinary parlance, if the prices at one store or restaurant are ten times those of a competitor, one would not say that the prices are "comparable," even though they can obviously be compared. *See* Merriam-Webster's Collegiate Dictionary 234 (10th ed.1997) (definitions for "comparable" include "similar, like" as in "fabrics of comparable quality").

The regulation thus is plain in its requirement that the wheelchair lines of sight be similar, or at least roughly similar, to those of other patrons. The criteria for evaluating similarity, moreover, while not explicit in the regulation, doubtless

include viewing angle.[6] Several district courts have come to precisely this conclusion. *See United States v. Hoyts Cinemas Corp.*, 256 F.Supp.2d 73, 88 (D.Mass.2003) (relying upon federal district court decisions in New York and California to conclude that "viewing angles are truly the only operative way of measuring whether the line of sight offered by a seat is 'comparable' to those offered to the general public"). And the Ninth Circuit has recently held that it was reasonable for the DOJ to interpret "comparable line of sight" to encompass factors such as viewing angle. *Oregon Paralyzed Veterans of America v. Regal Cinemas*, 339 F.3d 1126, 1132-33 (9th Cir.2003).

Moreover, as argued by the government, interpreting the "lines of sight" portion of ADAAG § 4.33.3 to require that wheelchair users be provided with comparable viewing angles, not just an unobstructed view of the movie screen, furthers the central goals of Title III of the ADA. The ADA fundamentally requires that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities,

6. Treatises cited by the government support the contention that within the field of theater design, "lines of sight" are compared on the basis of viewing angles. *See* George C. Izenour, Theater Design 3-4, 284 (1977); Harold Burris-Meyer & Edward C. Cole, Theaters and Auditoriums 68- 69 (2d ed.1964). Cinemark argues in response that the DOJ has waived its right to rely on such treatises because it did not present them to the district court below. To the extent that the treatises reflect the meaning of the term "comparable lines of sight," we may refer to them just as appropriately as we would refer, say, to a dictionary that was not cited below. The treatises give some support to the government's contended meaning of "comparable lines of sight," and we do not rely upon them for anything more than that.

privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). The thrust of that mandate leads us to conclude that the term "lines of sight comparable to those for members of the general public" requires that wheelchair users be afforded comparable viewing angles to those provided for the general public. Only then will wheelchair users have "equal enjoyment" with the general public. Under the district court's interpretation, a wheelchair-using patron could be relegated to the worst seats in the theater (assuming it was still among some seats for the general public), so long as the disabled patron still had an "unobstructed view" of the screen. This does not comport with the "full and equal enjoyment" language of Title III, nor does it seem likely that this is all the DOJ and the Access Board were attempting to guarantee for disabled persons when they formulated ADAAG § 4.33.3. A more reasonable interpretation of ADAAG § 4.33.3, given the purpose of Title III, is that the DOJ and the Access Board intended to assure disabled patrons seats of "comparable" quality to those provided for members of the general public.

Cinemark urges us to uphold the district court's very different understanding of the "line of sight" regulation. That understanding is based on the Fifth Circuit's holding in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir.2000). The *Lara* court rejected the contention that "the phrase 'lines of sight comparable' requires anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen." 207 F.3d at 789. Accordingly, the Fifth Circuit held that in the absence of a more specific regulation, ADAAG § 4.33.3 "does not require movie theaters to provide

disabled patrons with the same viewing angles available to the majority of non-disabled patrons." *Id.*

The arguments relied upon by the Fifth Circuit in *Lara* are, however, in the end not persuasive. First, the *Lara* court noted that "questions regarding 'viewing angle' did not arise until well after the DOJ promulgated section 4.33.3." 207 F.3d at 788. The *Lara* court found it significant that the Access Board, in proposing to modify § 4.33.3, proposed to define "line of sight" problems in the context of obstructed views, and recognized that "additional language would be necessary to codify the DOJ's litigating position." *Id.* The Fifth Circuit quoted the Access Board as follows:

> DOJ has asserted in attempting to settle particular cases that wheelchair seating locations [in stadium-style theaters] must: (1) be placed within the stadium-style section of the theater . . . ; (2) provide viewing angles that are equivalent or better than the viewing angles . . . provided by 50 percent of the seats in the auditorium, counting all seats of any type sold in that auditorium; and (3) provide a view of the screen, in terms of lack of obstruction . . . that is in the top 50 percent of all seats of any type sold in the auditorium. The Board is considering whether to include specific requirements in the final rule that are consistent with the DOJ's interpretation of 4.33.3 to stadium-style movie theaters. 64 Fed.Reg. at 62278.

See Lara, 207 F.3d at 788. Immediately preceding the language cited by the Fifth Circuit, however, the Access Board stated:

Appendix A

> As stadium-style theaters are currently designed, patrons using wheelchair spaces are often relegated to a few rows of each auditorium, in the traditional sloped floor area near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt their heads back at uncomfortable angles and to constantly move their heads from side to side to view the screen. They are afforded inferior lines of sight to the screen.

64 Fed.Reg. at 62278. This passage notes that wheelchair-using patrons are afforded "inferior lines of sight" because the close proximity to the screen of the wheelchair placements causes their viewing experience to be uncomfortable. It demonstrates that lines of sight have a qualitative aspect: lines of sight can be "inferior," not simply obstructed or unobstructed.

In addition, the language cited by the Fifth Circuit does not definitively support the conclusion that the Access Board acknowledged that additional language will be necessary to codify the DOJ's litigating position. The Access Board explained that "[t]he Board is considering whether to include *specific* requirements in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters." 64 Fed.Reg. 62278 (emphasis added). The inclusion of the word "specific" implies that although the Board might think that the present language of ADAAG § 4.33.3 is broad enough to include the DOJ's interpretation, it is considering whether to make these requirements explicit in the final rule. The

language of the Access Board with regard to the proposed modification of ADAAG § 4.33.3 at least equally supports an interpretation of that section that includes a qualitative element in the comparable "lines of sight" analysis.

Second, the Fifth Circuit noted that although "the phrase 'lines of sight' lacked a clear meaning in the ADA context, it is clear that in a number of other contexts, the phrase meant unobstructed view." *Id.* at 788. The Fifth Circuit cited three other, unrelated regulations that use "line of sight" to mean unobstructed view, including a Federal Communications Commission regulation requiring that antennae have line of sight, without obstruction, of the communities that they serve. *Id.* The fallacy of this argument is that ADAAG § 4.33.3 does not just require that wheelchair patrons have "lines of sight." They must be afforded *comparable* lines of sight. That requirement is perfectly consistent with interpreting "line of sight" to mean unobstructed view. The holding of the Fifth Circuit in *Lara* effectively ignored the phrase "comparable to those for members of the general public," and in so doing failed to take sufficiently into account the purpose of Title III of the ADA. The phrase, in the Fifth Circuit's interpretation, would be reduced to meaning simply a "similarly unobstructed" view. *See Meineker v. Hoyts Cinemas Corp.*, 216 F.Supp.2d 14, 18 (N.D.N.Y.2002), *vacated and remanded on other grounds*, 69 Fed.Appx. 19 (2d Cir.2003). This does not give sufficient meaning to the regulation.

Since *Lara* was decided, the Ninth Circuit and several district courts have rejected its reasoning. *See Or. Paralyzed Veterans of Am. v. Regal Cinemas*, 339 F.3d 1126, 1132-33

(9th Cir.2003) (reversing *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 142 F.Supp.2d 1293 (D.Or.2001)); *United States v. Hoyts Cinemas Corp.*, 256 F.Supp.2d 73, 84-89 (D.Mass.2003); *Meineker*, 216 F.Supp.2d at 17, *United States v. AMC Entm't, Inc.*, 232 F.Supp.2d 1092, 1110-12 (C.D.Calif.2002).

Our conclusion that the plain meaning of "lines of sight comparable to those for members of the general public" requires more points of similarity than merely an unobstructed view is further supported by DOJ's interpretation of ADAAG § 4.33.3. As a general matter, deference should be given to an agency's interpretation of a regulation when the agency has been given responsibility to issue regulations under the statute in question, to explain the responsibilities of those concerned under the statute, and to enforce the statute in court. *See Bragdon v. Abbott*, 524 U.S. 624, 646, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). The DOJ has these responsibilities in this context. *See* 42 U.S.C. § 12186(b); 42 U.S.C. § 12188(b)(1)(B). When an agency is interpreting its own regulations, even greater deference is due to the agency's interpretation. *See United States v. Midwest Suspension & Brake*, 49 F.3d 1197, 1203 (6th Cir.1995). Therefore, the DOJ's interpretation should be upheld unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). To be sure, we are not required to defer to the DOJ's interpretation if an "alternative reading is compelled by the regulation's plain language or by other indications of the [DOJ's] intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (*quoting*

Gardebring v. Jenkins, 485 U.S. 415, 430, 108 S.Ct. 1306, 99 L.Ed.2d 515 (1988)). The Supreme Court has also indicated that deference to an agency's "convenient litigation position" would be "entirely inappropriate" where the agency's position is contrary to the view advocated by the agency in past cases and is not "reasoned and consistent." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); *see Auer*, 519 U.S. at 462, 117 S.Ct. 905 (contrasting an agency's "*post hoc* rationalization" with a "fair and considered judgment") (internal quotation marks omitted). The DOJ position in this case is neither plainly erroneous nor inconsistent with the regulation. Nor is it inconsistent with views advocated by DOJ in earlier cases.

The DOJ argues that the "lines of sight comparable" portion of ADAAG § 4.33.3 includes a consideration of the quality of the viewing angle of the movie screen. This is consistent with our conclusion that the plain meaning of ADAAG § 4.33.3 requires that there be greater points of commonality between lines of sight than that the lines of sight share an unobstructed view; in order to be comparable, viewing angles must also be taken into account to some degree. Since this DOJ interpretation is consistent with the plain meaning of the regulation, it is entitled to deference. *See Auer*, 519 U.S. at 461, 117 S.Ct. 905.

We leave it to the district court on remand to determine the extent to which lines of sight must be similar for wheelchair patrons in stadium-style theaters, but hold that the plain meaning of "lines of sight comparable to those for members of the general public" clearly requires more points

of similarity than merely an unobstructed view. In short, we disagree with the reasoning of the Fifth Circuit in *Lara*,[7]

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7. Cinemark, citing *Colby v. J.C. Penney Co.*, 811 F.2d 1119 (7th Cir.1987), also asserts that this court should give deference to the decision of the *Lara* court and follow that holding because to do otherwise would subject Cinemark to inconsistent legal obligations. In *Colby* the Seventh Circuit stated:

> A posture somewhere in between some deference and complete deference is proper when cases in different circuits challenge the same practice of the same defendant, particularly if different outcomes would place the defendant under inconsistent obligations. . . . [T]he fact that [a previous] case involved the identical issue in a lawsuit brought against the identical defendant by a plaintiff having the same interests as [the plaintiff in the current case] is a reason for the district court in the present case to have given serious consideration to the [previous] decision—but not a reason to invoke stare decisis and give the decision complete deference automatically, as the [lower] court appears to have done. . . . Where different outcomes would place the defendant under inconsistent legal duties, the case for the second court's not going into conflict with the first is particularly strong. A conflict would place the defendant in an impossible position unless the Supreme Court agreed to hear the case. . . .

Id. at 1124. As this quote makes clear, automatic deference to the decision of another circuit is not required, although there may be strong reasons for deference when to decide otherwise would subject a party to inconsistent legal duties. However, the "inconsistent legal obligations" that Cinemark will suffer from in this case do not appear

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and therefore conclude that the district court erred in holding that ADAAG § 4.33.3 merely required unobstructed views of the movie screen. We therefore reverse the judgment of the district court and remand for further proceedings in accordance with this opinion.

3. The Alternative Grounds Advanced by Cinemark on Which to Affirm the Judgment of the District Court are Unpersuasive.

Cinemark advances several alternative grounds that it argues require us to affirm the judgment of the district court. These grounds are (1) that the DOJ's interpretation of ADAAG § 4.33.3 amounts to a new substantive rule in circumvention of the Administrative Procedure Act's (the "APA's") notice and comment requirements; (2) that the government should be estopped from arguing for its interpretation of ADAAG § 4.33.3 because it approved the TAS, which Cinemark's theaters were built in compliance with; (3) that the government is precluded under the doctrine

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to be insurmountable: any chain of stores that extends across state lines is subject to the different building codes of the various states in which it chooses to build a store (and probably to a variety of different local ordinances at each location as well). This is not such an "impossible position" as defendant would lead us to believe.

In any event, this consideration is insufficient to require us to change our interpretation of ADAAG § 4.33.3, particularly now that the Ninth Circuit has already created a split in the circuits on that legal issue in *Or. Paralyzed Veterans of Am. v. Regal Cinemas*.

of collateral estoppel from re-litigating issues that it previously litigated unsuccessfully against Cinemark in *Lara*; and (4) that at the very least summary judgment should be given to Cinemark with regard to its theaters in the Fifth Circuit. None of these arguments provide alternative support for the district court's grant of summary judgment.

A. The APA's Notice and Comment Requirements

Cinemark asserts that the DOJ's interpretation of ADAAG § 4.33.3 mandates new substantive requirements without undergoing notice and comment as required by the Administrative Procedure Act, 5 U.S.C. § 553. According to Cinemark, the DOJ's attempt to introduce a new quantitative viewing angles requirement imposes new obligations on theater construction, obligations that were not required under the plain meaning of ADAAG § 4.33.3, and therefore this requirement should have been implemented through the APA's notice-and-comment procedures.

This argument runs against a long-settled principle of federal administrative law. An agency's enforcement of a general statutory or regulatory term against a regulated party cannot be defeated on the ground that the agency has failed to promulgate a more specific regulation. *See SEC v. Chenery Corp.*, 332 U.S. 194, 201, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974). " 'The choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the

administrative agency.' " *Id.* at 293, 94 S.Ct. 1757 (quoting *SEC v. Chenery*, 332 U.S. at 203, 67 S.Ct. 1575).[8]

In the instant case the enforcement action is either warranted by the statute and the regulation or it is not. Since the action is so warranted, then (under *Chenery* and *Bell Aerospace*) nothing in the APA requires additional

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8. Moreover, even if the government's litigating position in the instant enforcement action were considered a "rule" subject to the APA, the exception to the notice-and-comment requirement for interpretive rules would apply. 5 U.S.C. § 553(b)(A). We have recognized the distinction between interpretive and substantive (or legislative) rules as follows:

> A legislative rule is one that "has the force of law," while an interpretive rule is "merely a clarification or explanation of an existing statute or rule" and is " 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.' " *Guardian Fed. Sav. & Loan v. Fed. Sav. & Loan Ins. Corp.*, 191 U.S.App. D.C. 135, 589 F.2d 658, 664-65 (D.C.Cir.1978) (*quoting* U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n. 3 (1947)). Legislative rules "grant rights, impose obligations, or produce other significant effects on private interests," while interpretive rules do not "foreclose alternative courses of action or conclusively affect rights of private parties."

Ohio Dep't of Human Servs. v. Dept. of HHS, 862 F.2d 1228, 1233 (6th Cir.1988). The government here is not even arguably relying upon the effect of its litigating position as independently substantively binding. Instead, it is arguing on the basis of its interpretation of ADAAG § 4.33.3.

rulemaking. But even if the action were not warranted, then enforcement should be denied on that ground alone, and any APA notice-and-comment argument would be surplusage.

B. Estoppel

Cinemark also asserts that the government should be estopped from asserting a "new" interpretation of ADAAG § 4.33.3 that invalidates approvals given pursuant to TAS, given that TAS was certified by the DOJ as "meeting or exceeding" the requirements of the ADA and Cinemark relied upon these approvals.[9] Of course, with the possible exception of "affirmative misconduct," equitable estoppel does not run against the government. *E.g.*, *Schweiker v. Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981). On the other

9. In its *amicus* brief, the American Institute of Architects (the "AIA") argues that reliance on state or local standards such as TAS that have been certified by the DOJ should shield a builder from liability. Its stated motivation in making this argument is to shield architects from liability that could result if the DOJ later finds that a theater is not in compliance with the ADA and the theater owner brings suit against the architect. The AIA argues that the certification process is a sensible way in which architects can determine in advance which designs are in compliance with the ADA, given the lack of clarity in the current regulations. According to the AIA, it has no interest in what the substantive requirements of the ADA are; it simply wishes to have a process by which architects can make certain that their plans comply with the ADA. Although we do not question the wisdom of such a process, we have no power to create such a process where the legislature and the executive have not taken sufficient steps to do so. Contrary to the AIA's assertion, the DOJ has expressly stated that certification is not a process on which architects can completely rely.

hand, due process concerns may warrant denial of enforcement of an agency determination when conduct previously approved by a regulatory agency is retroactively branded as a statutory violation. As Judge Friendly colorfully expressed in the labor relations context:

> Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as "unfair" conduct stamped "fair" at the time a party acted, raises judicial hackles considerably more than [for instance, imposing a more severe remedy for conduct already prohibited]. And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established.

NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966) (citations omitted). Cinemark's reliance on TAS and the government's statements with respect to the state building code certification process weigh strongly in favor of making any relief that the district court grants the govern-ment on remand apply only on a prospective basis. We do not go so far as to hold that any relief *must* be prospective to comport with due process, but note that, given the following facts, prospective relief will often be most appropriate.

Appendix A

The DOJ stated in numerous publications that approval given pursuant to state or local ordinances such as TAS constituted "rebuttable evidence" that the building was in compliance with the ADA. *See* 42 U.S.C. 12188(b)(1)(A)(ii); J.A. at 154. Even in the DOJ's press release announcing certification for TAS, the DOJ stated that "[b]uilders will also have additional legal protection in ADA lawsuits if they build in compliance with the certified code." J.A. at 153. The word "additional" is consistent with the other statements issued by the DOJ that compliance with TAS constitutes "rebuttable evidence" that the theater was in compliance with the ADA. This is not incontrovertible evidence; instead, it gives a presumption in favor of the builder, but that presumption may be overcome.

Because the DOJ's statements said that the certification of the state or local building ordinances was not something upon which the builder could completely rely, the district court should not be altogether barred from ordering some kind of remedial measures for existing facilities if the facts warrant such relief. The DOJ's statements also imply, however, that a cinema builder should be able to rely—at least to some degree—on the approval of their building plans by state or local inspectors that were certified by the DOJ. The phrases "rebuttable evidence" and "additional legal protection" indicate that a builder and the owner should have some measure of protection from an enforcement action by the government. The government has assured us that any remedial measures they will request on remand will take into account the cost and feasibility that implementation of the measures would require, and that it would "work with

[Cinemark] to come up with a reasonable approach."[10] Limited remedial measures such as those proposed by the DOJ at

10. At oral argument, the attorney from the DOJ stated that "I want to make very clear to the court, we have emphasized repeatedly the United States is not—has not and is not going to argue, for example, that the entire interior of the theater be gutted or torn down. We are going to work with the defendants to come up with a reasonable approach."

In response to a question from the court as to "the earliest date that the government ... let the theater designers, owners, builders know that the government was taking the position that lines of sight included angles of viewing," DOJ counsel responded, "as far as a widely published document, it was the *Lara* brief filed in a district court in Texas in July of 1998."

DOJ counsel also acknowledged that there will be hard cases in which reasonable people will disagree about whether a wheelchair position is comparable to where most people sit. DOJ counsel stated that

> in those situations, it is appropriate for a district judge to take into account notice and due process concerns in deciding whether there were any remedy. But what I'm saying is just because there are cases in some situations does not mean you can't order relief for situations where there's a clear violation where they are all in the front row.

DOJ counsel further emphasized that "we're not going to ask for an extreme remedy, because what has been suggested is that we're talking about gutting these theaters, and we understand as a practical matter once theaters are built, even though we believe some remedy is

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oral argument would fulfill the ADAAG § 4.33.3 requirement that wheelchair placements have "lines of sight comparable to those for members of the general public," but would also comport with due process by allowing Cinemark to rely on the approval of the TAS where that reliance was reasonable in light of ADAAG § 4.33.3. In short, in fashioning any remedy the district court, as a court of equity, can take into account previous advice and representations by the government upon which Cinemark or this court reasonably relied.

C. Collateral Estoppel

Collateral estoppel does not bar the government from bringing this action against Cinemark. Cinemark contends

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(Cont'd)

required, if in fact it's just—would essentially eliminate half the seats as [opposing counsel] would put in a ramp—we're not going to propose that as a remedy."

In response to a question from the court regarding whether wheelchair seating would have to be placed in the middle of the stadium seating instead of in the front of the stadium, perhaps thereby requiring an elevator to be put in, DOJ counsel responded: "where you have an elevated stadium section, certainly I think getting the wheelchair up to the first row of the stadium section, not the traditional style, would dramatically improve the experiences for people in wheelchairs." DOJ counsel subsequently indicated that "[f]or the typical stadium-style theater that we've seen, if the wheelchair space was up on the first row of that elevated section, I think, as a remedial matter, we would be satisfied."

Our holding in this case assumes that the DOJ will stand by these representations.

that the government is precluded under the doctrine of collateral estoppel from relitigating issues against Cinemark that it and others previously litigated unsuccessfully against Cinemark in *Lara*. The Sixth Circuit has established a four-part test for determining whether and when collateral estoppel bars relitigation of an issue:

> 1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
>
> 2) determination of the issue must have been necessary to the outcome of the prior proceeding;
>
> 3) the prior proceeding must have resulted in a final judgment on the merits; and
>
> 4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, 97 F.3d 155, 161 (6th Cir.1996). The first three parts of this test are not contested in the present appeal. The government does contest the fourth prong, however, asserting that its role as an *amicus curiae* in *Lara* was not sufficient to satisfy this test.

As a general matter, *amicus* participation does not trigger collateral estoppel. *See United States v. Michigan*, 940 F.2d 143, 165 (6th Cir.1991). Nevertheless, the Supreme Court has found that in some extraordinary cases a party may be

barred by collateral estoppel for its earlier role as an *amicus curiae*. *See Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). In that case the government went beyond merely filing an *amicus* brief, but also "totally financed and controlled" the litigation. *United States v. Mendoza*, 464 U.S. 154, 159 n. 5, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984).[11]

Cinemark asserts that the government's actions in this case amount to the extraordinary circumstances discussed in

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11. The Supreme Court in *Montana* noted that it was undisputed that the United States exercised control over the earlier litigation in which it had been an amicus. 440 U.S. at 155, 99 S.Ct. 970. In particular, the government had stipulated that it had:

> (1) required the [earlier] lawsuit to be filed;
>
> (2) reviewed and approved the complaint;
>
> (3) paid the attorneys' fees and costs;
>
> (4) directed the appeal from State District Court to the Montana Supreme Court;
>
> (5) appeared and submitted a brief as amicus in the Montana Supreme Court;
>
> (6) directed the filing of a notice of appeal to [the Supreme] Court; and
>
> (7) effectuated [the named party's] abandonment of that appeal on advice of the Solicitor General.

Id.

Montana. Specifically, Cinemark asserts that the government went beyond the role of neutral friend of the court by asserting a new substantive claim, by introducing new evidence, by filing a second brief, by submitting responses in opposition to Cinemark's motions, and by taking part in oral arguments before both the district court and the Fifth Circuit.

The government, in response, contends that it did not assert a claim against Cinemark, nor did its attaching a report to its *amicus* brief constitute the submission of new evidence. It further argues that in its opposition to Cinemark's motion to compel discovery from the DOJ, it emphasized that its role as a non-party and as *amicus* was limited to providing the court with the Department of Justice's interpretation of its own regulations. Finally, the government notes that it opposed Cinemark's motion for a scheduling order amendment that would have permitted Cinemark to seek to add the DOJ as a party.

Although the government's actions in *Lara* might have been more than that of a typical *amicus curiae*, they are still a far cry from having "totally financed and controlled" the litigation. *Mendoza*, 464 U.S. at 159 n. 5, 104 S.Ct. 568. The government was therefore not collaterally estopped in this case.

D. Summary Judgment for Cinemark's Theaters that are Within the Fifth Circuit

Finally, Cinemark argues that the government's assertion of claims with a national scope ignores that *Lara* is controlling authority in the Fifth Circuit and that the government cannot

ask the Sixth Circuit to overturn precedent as applied to theaters within the Fifth Circuit's jurisdiction. Cinemark therefore urges this court to affirm the district court's decision granting summary judgment as to all of Cinemark's stadium-style theaters that are within the jurisdiction of the Fifth Circuit.

This pertains to the scope of relief, and therefore is a matter for the district court to decide consistent with the principles of comity. The government has stated in its brief that it will not make any demands with regard to Cinemark's theaters that are within the Fifth Circuit until such time as the law might change within that circuit. Therefore, we need not address this issue at the present time.

CONCLUSION

Because the district court erred in holding that ADAAG § 4.33.3 requires only that theaters provide disabled patrons with unobstructed views of the screen and failed to give meaning to the word "comparable" in ADAAG § 4.33.3, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DISTRICT IN *UNITED STATES OF AMERICA v. CINEMARK USA, INC.* DATED NOVEMBER 19, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:99 CV- 705

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINEMARK USA, INC.

Defendant.

JUDGE DONALD C. NUGENT

MEMORANDUM OPINION AND ORDER

This case arises under Title III of the Americans with Disabilities Act (the "ADA") and is before the Court upon cross motions by the parties for summary judgment. Defendant Cinemark USA, Inc. ("Cinemark") filed its second motion for summary judgment on December 11, 2000 (docket no. 70). Plaintiff, the United States, filed a cross motion for partial summary judgment on January 18, 2001 (docket no. 78). For the reasons stated below, the government's motion for partial summary judgment is DENIED. Defendant's second motion for summary judgment is GRANTED.

Appendix B

Facts

The following facts are not in dispute. Cinemark is a Texas corporation that constructs, owns and operates movie theater multiplexes throughout the United States. In 1995, Cinemark began constructing and operating "stadium-style" movie theaters. Stadium style theaters roughly emulate the seating configuration of a typical sports stadium, providing "stepped seating" that rises at a slope of over five percent. This elevated seating configuration eliminates the "obstructed" view problems that occur, for example, when a tall individual sits in front of a shorter individual. By contrast, traditional style seating is placed on a sloped floor.

Cinemark operates stadium-style theaters nationwide, including in Ohio. Cinemark currently operates 71 stadium-style movie theater multiplexes throughout the United States, each of which contains between 7 and 24 screens. Cinemark provides wheelchair accessible seating in its stadium-style theaters, but not as part of the stadium seating configuration. Wheelchair accessible seating in Cinemark's stadium-style theaters is located on a flat portion of each theater near the front of the seating area, generally at or about the third row of the theater. The wheelchair accessible seating is in front of the tiered, "stadium-style" seats.[1] The wheelchair seating is placed near entranceways and exits.

The government filed this action against Cinemark on March 24, 1999, alleging that Cinemark's stadium-style

1. In Cinemark's stadium style movie theater auditoriums with 300 or more seats, wheelchair seating is also provided via elevator access to seats at the rear of the theater.

theaters deny access to persons with disabilities who use wheelchairs in violation of Title III of the ADA and its implementing regulations. The government seeks a declaration that Cinemark has violated the ADA in the design and construction of its movie theaters in Ohio and throughout the United States; an order that Defendant undertake repairs of its stadium-style theaters to bring them into compliance with the ADA; an injunction against Cinemark from taking any further action in designing or constructing stadium-style theaters that do not comply with the ADA, a civil penalty, and compensatory damages for those persons with disabilities who were discriminated against by Cinemark. (Complt. Prayer for Relief.)

Cinemark denies that its theaters violate the ADA.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." *Id.*

The moving party has the initial burden of proving that no genuine issue of fact exists and that the moving party is entitled to judgment as a matter of law. To meet this burden, the moving party may rely on any of the evidentiary sources listed in Rule 56(c) or may merely rely upon the failure of the nonmoving

party to produce any evidence which would create a genuine dispute for the jury. If the moving party satisfies its burden, then the burden of going forward shifts to the nonmoving party to produce evidence that results in a conflict of material fact to be resolved by a jury. A scintilla of evidence in support of the nonmoving party's position is not enough. There must be evidence from which a reasonable jury could find for the nonmoving party. If the evidence is insufficient to reasonably support a verdict in favor of the nonmoving party, the motion for summary judgment will be granted. In considering a motion for summary judgment, the Court must afford all reasonable inferences, and construe the evidence in the light most favorable to the nonmoving party. *Cox v. Kentucky Dept. of Transportation*, 53 F.3d 146, 149-150 (6th Cir. 1995).

Discussion

The government moves for partial summary judgment only with respect to "Cinemark auditoriums with both stadium-style and traditional seating, where all wheelchair accessible seating is provided in the non-stadium style section, *i.e.*, in auditoriums that seat fewer than 300 persons." (Gov. Mem. at 2.)[2] The government contends these theaters violate Title III of the ADA and its implementing regulations.[3]

2. Although the government does not specifically identify which of Cinemark's theaters are of this type, Cinemark submits affidavit testimony that only its "first generation" theaters fall within this description. (Supp. Harton Aff. Ex. B ¶ 4.) All of Cinemark's "first generation" theater complexes were approved, fully constructed and opened for business by March 1998. *Id.*

3. There is no dispute that Cinemark's stadium-style theaters are "public accommodations" subject to Title III of the ADA.

Appendix B

First, the government contends Cinemark's theaters violate Section 302 of the ADA. Section 302(a) provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns . . . or operates a place of public accommodation.

42 U.S.C. § 12182(a).

Section 302(b) of the ADA sets forth a number of acts and omissions which constitute discrimination under Section 302(a), including affording individuals with disabilities "the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals" and providing individuals with disabilities "a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals. . . ." 42 U.S.C. § 12182(b)(ii), (iii). Section 302(B) requires that goods, services and facilities "be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. § 12182(B).

The government asserts that Cinemark's placement of wheelchair accessible seating only in traditional seating on the sloped portion of theater near the front of the theater violates these provisions. It contends that the seating provided

to wheelchair patrons is unequal and inferior to the stadium-style seats offered non-wheel chair patrons. In particular, the government asserts that stadium-style seating provides superior sightline advantages not available in traditional seats. Thus, wheelchair patrons who go to Cinemark's theaters pay the same administration price as non-disabled patrons, but must chose a seat in the front of the theater where the viewing angle to the screen is not as comfortable as in the stadium-style seats. The government states:

> [P]atrons who use wheelchairs must sit near the front of the auditorium, close to the wall-to-wall screen, and separated from most of the general public seated behind them on the elevated risers of stadium seating. When the movie begins, these patrons are forced to shift in their chairs, tilt their heads back at an uncomfortable angle, or move their heads from side to side many times per minute in order to capture the action on the enlarged stadium theater screen directly in front of them.

(Gov. Mem. at 21.)

The government also contends Cinemark's theaters violate Section 303 of the ADA and its implementing regulations. Section 303 of the ADA pertains to new construction and alterations in public accommodations. *See* 42 U.S.C. § 12183. Section 303 provides that it shall be discriminatory under the ADA to design and construct public accommodations and commercial facilities that fail to comply with standards issued by the Department of Justice. 42 U.S.C.

§ 12183(a)(1). Congress expressly charged the DOJ with responsibility for issuing final regulations that include accessibility standards for newly constructed and altered places of public accommodation and commercial facilities. 42 U.S.C. § 12186(b). In Section 504 of the ADA, Congress required the Architectural and Transportation Barriers Compliance Board (the "Access Board") to issue guidelines to provide guidance to the DOJ in establishing those standards: 29 U.S.C. § 792(b). The ADA requires the DOJ's standards to be consistent with the Access Board's guidelines. 42 U.S.C. § 12186(c).

On July 26, 1991, the Access Board published the Americans with Disabilities Act Accessibility Guidelines, known as "the ADAAG." 56 Fed. Reg. 35408, 36 C.F.R. Part 1191. On the same day, the DOJ published final regulations implementing Title III of the ADA, which incorporated the ADAAG without revision. 28 C.F.R. Part 36.

Section 4.33.3 of the ADAAG pertains to the placement of wheelchairs and provides:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be

> installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.
>
> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having slope lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. Ch. I, Pt. 36, App. A, § 4.33.3.

The government contends Cinemark's theaters violate the requirements of Section 4.33.3 that wheelchair areas "be an integral part of any fixed seating plan" and provide people with disabilities "lines of sight comparable to those for members of the general public."

The government asserts that to be an integral part of the fixed seating plan as required by Section 4.33.3, a wheelchair space in a stadium style theater must "be part of the auditorium seating where members of the public routinely sit." (Gov. Mem. at 24.) The government asserts that "[i]n stadium-style theaters, the general public sits primarily in stadium-style seats." Thus, the government contends, Section 4.33.3 requires that wheelchair spaces be afforded in stadium-style seats.

The government contends that to provide lines of sight comparable to those provided to the general public, Cinemark must afford wheelchair patrons seating that provides "viewing angles, distance to the screen, obstruction of view

and distortion of images" comparable to that offered to "most members of the general public." (Gov. Mem. at 26.) The government contends that the location of the wheelchair seating in Cinemark's theaters is among the worst in the house and offers lines of sight inferior to those provided most members of the general public who sit in the stadium-style seats.

The government asks the Court to "grant partial summary judgment rulings" as follows:

> (1) That Section 302 of the ADA and its implementing regulations, 28 C.F.R. §§ 36.201, 36.202, and 36.203 prohibit movie theater owners and operators from excluding people who use wheelchairs from seating in the stadium-style sections of a theater auditorium while offering such seating to the general public;
>
> (2) That Cinemark has violated Section 303 of the ADA and 28 C.F.R. §§ 36.201, 36.202, and 36.203 in its auditoriums that seat fewer than 300 persons and that individually include both stadium-style and non-stadium style seating, by allowing members of the general public access to stadium-style seats while denying persons who use wheelchairs access to the stadium-style section of the theater;
>
> (3) That Section 303(a) of the ADA, 42 U.S.C. § 12183(a) and its implementing regulation, 28 C.F.R. Subpart D and Standard 4.33.3 which

require that wheelchair seating be an integral part of any fixed seating plan, mandate that in a stadium-style theater, the required number of wheelchair spaces must be provided in the stadium-style section of the theater;

(4) that Cinemark has violated these provisions in constructing and altering stadium-style theaters by placing wheelchair seating areas in the non-stadium-style portion of the theaters;,

(5) That Section 303(a) of the ADA, 42 U.S.C. § 12183(a) and 28 C.F.R. Subpart D and Standard 4.33.3 mandate newly constructed and altered movie theaters with stadium-style seating to provide wheelchair spaces with lines of sight comparable to those for members of the general public; and

(6) That Cinemark has violated these provisions in movie theaters with stadium-style seating by failing to provide lines of sight for wheelchair users that are within the range of viewing angles provided to most members of the general public.

(Gov. Mem. at 34-35.)

Cinemark opposes the government's motion and moves for summary judgment in its favor on all of the ADA claims alleged against it. Cinemark contends its theaters comply with the ADA because they satisfy the requirements of the ADAAG, which sets forth the standards newly constructed buildings must follow in order to comply with the ADA.

Appendix B

Cinemark relies on the Fifth Circuit's decision in *Lara, et al. v. Cinemark USA, Inc.*, 207 F.3d 783, *cert. denied*, 531 U.S. 944 (2000).

In *Lara*, a group of individuals with disabilities and two disability rights activist groups filed suit against Cinemark alleging that the wheelchair placements in Cinemark stadium-style movie theaters in El Paso, Texas violated state and federal accessibility laws. In *Lara*, as here, Cinemark located wheelchair accessible seating on the sloped floor near the front of the theaters and in front of the stadium-style seats. Plaintiffs alleged, as the government alleges here, that Cinemark's wheelchair seating was uncomfortable, too close to the screen and was inferior in terms of viewing angle to the screen to the view offered in the stadium-style seats.

The Fifth Circuit held that Cinemark's theaters complied with Section's 4.33.3's requirement that wheelchair patrons be provided "lines of sight comparable to those for members of the general public." The Court held that Section 4.33.3 does not require movie theaters to provide disabled patrons with the same viewing angles available to the majority of non-disabled patrons. Instead, the Court held, the "lines of sight comparable" phrase in Section 4.33.3 required only that wheelchair-bound patrons be provided unobstructed views of the screen. *Lara*, 207 F.3d at 789.

The *Lara* Court reasoned that in contrast to questions of viewer obstruction which the Access Board and the DOJ explicitly considered before issuing Section 4.33.3, questions regarding "viewing angle" did not arise until well after the DOJ issued Section 4.33.3. *Id.* at 788. The Court also found

that although the phrase "lines of sight" lacked a clear meaning in the ADA context at the time the DOJ adopted Section 4.33.3, in other contexts the phrase meant "unobstructed view." *Id.* Finally, the Court found significant language by the Access Board in a Notice of Proposed Rulemaking published in the Federal Register on November 16, 1999. *Id.*, *citing* 64 Fed. Reg. 62248, at 62278 (Nov. 16, 1999). The Board stated in the Notice that it was aware the DOJ had taken the position in attempting to settle particular cases involving stadium-style seating that wheelchair seating must be located in the stadium-style sections and provide viewing angles provided by 50 percent of the seats in the auditorium and a view of the screen in terms of lack of obstruction in the top 50 percent of all seats sold in the theater. The Board stated, however, that it was "*considering* whether to include specific requirements in the final rule that are consistent with the DOJ's interpretation of 4.33.3 to stadium-style movie theaters." *Id.* (emphasis added.) The Court found this language to indicate recognition by the Access Board that modification to Section 4.33.3 was necessary in order to codify the DOJ's "litigating position." The Court held that because the evidence did not show that the Access Board intended current Section 4.33.3 to impose a viewing angle requirement, the phrase "lines of sight" in Section 4.33.3 did not require anything more than that theaters provide wheelchair-bound patrons unobstructed views of the screen. *Lara*, 207 F.3d 789.

Cinemark contends *Lara* is highly persuasive authority here "since all of the DOJ's claims are . . . predicated on the same 'litigating position' rejected by the Fifth Circuit in *Lara* and since all of Cinemark's stadium-style movie theaters meet

the accessibility criteria held by the Fifth Circuit to be legal," *i.e.*, that wheelchair be patrons be afforded seating with unobstructed views of the screen amidst seating for the general public. (Cinemark Mem. at 11.)

Cinemark also maintains that it entitled to summary judgment on the basis of estoppel, and it asserts that the DOJ's "attempt to impose new construction requirements for wheelchair-accessible seating through litigation violates the Administrative Procedure Act." (Cinemark Mem. at 17.) Cinemark asserts that since it was granted accessibility approvals for its stadium-style movie theaters in Texas under Texas's accessibility guidelines, and the DOJ certified Texas's guidelines as "meeting or exceeding the standards of the ADAAG," the DOJ should be estopped from asserting a litigating position here that "summarily invalidates state and local accessibility approvals already granted under [the DOJ's] own state code certification program after Cinemark has relied on them." (Cinemark Mem. at 13.) Cinemark contends that the doctrine of collateral estoppel applies to bar the government's claims because the DOJ was actively involved in the *Lara* lawsuit in which the Court rejected the government's litigating position. At a minimum, Cinemark contends, *Lara* is binding as to all Cinemark theaters located within the Fifth Circuit.

This Court finds the reasoning of the *Lara* Court persuasive. The government has not persuaded the Court that either the DOJ or the Access Board intended Section 4.33.3 to encompass viewing angle. Like the *Lara* Court, this Court finds the comments of the Access Board in its November 16, 1999 Notice of Proposed Rulemaking particularly significant.

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In its 1999 Notice of Proposed Rulemaking, the Access Board acknowledged its awareness of the DOJ's "litigating position" with respect to stadium-style theaters, but stated that it was *considering* whether Section 4.33.3 should be modified to reflect the DOJ's position. The Access Board stated:

> Stadium-style motion picture theaters comprise a type of assembly area that has become increasingly popular in the last several years. They provide the general public with sight lines to the screen that generally are superior to those offered in traditional-style motion picture theaters. Stadium-style theaters provide improved viewing in one key way: they furnish an **unobstructed view** of the entire screen through the utilization of relatively high risers that furnish **unobstructed viewing** over the heads of the persons seated in the rows ahead . . .
>
> The Board is aware of the [DOJ]'s enforcement of [Section] 4.33.3 with respect to assembly areas with stadium-style seating. DOJ has stated that 4.33.3 requires that wheelchair areas be an integral part of any fixed seating plan, and be provided so that people with disabilities have lines of sight and a choice of admission prices comparable to those for other members of the general public. As applied to stadium-style theaters . . . DOJ has asserted in attempting to settle particular cases that wheelchair seating locations must: (1) Be placed within the stadium-style section of the theater, rather than on a sloped floor of other area within

> the auditorium where tiers or risers have not been used to improve viewing angles; (2) provide viewing angles (including vertical, horizontal, and angle to the top of screen) provided by 50 percent of the seats in the auditorium; and (3) provide a view of the screen, in terms of lack of obstruction (e.g., a clear view over the heads of other patrons), that is in the top 50 percent of all seats of any type sold in the auditorium. **The Board is considering whether to include specific requirements in the final rule that are consistent with the DOJ's interpretation of 4.33.3 to stadium-style movie theaters**.

64 Fed. Reg. at 62278 (emphasis added.) Significantly, the Board explained the superior nature of stadium seating in terms of unobstructed views, and acknowledged that changes to current law were necessary to codify the DOJ's litigating position.

The Access Board also stated in its Notice that it was "considering whether to provide additional guidance on determining whether lines of sight are comparable in assembly areas." The Board further stated:

> When the dispersion of wheelchair spaces is not required (*i.e.*, in small assembly areas) the placement of the wheelchair spaces in relation to other seating acquires greater significance because wheelchair users are not offered a choice of viewing angles. Therefore . . . **it may be necessary** for wheelchair spaces not only to

> provide lines of sight comparable to those provided to spectators seated in the same area, but also to provide lines of sight that are comparable to those provided for most of the other patrons in the assembly area. Consequently, the Board is **considering** specifying that wheelchair spaces in assembly areas, where dispersion is not required, must be located so that the lines of sight provided are comparable to (*i.e.*, equal to or better than) the lines of sight provided to the "majority" of the patrons in the assembly area.

Id.

This Court finds the comments by the Access Board in its recent Notice evidence that the DOJ's position with respect to Cinemark's stadium style theaters is not embodied in current Section 4.33.3.

The government contends that the Court should defer to its interpretation of its regulation. However, "[a] court should not defer to an agency's interpretation of its own regulation if an alternative reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Caruso v. Blockbuster-Sony Music Ent. Centre*, 193 F.3d 730 (3rd Cir. 1999), *quoting Thomas Jefferson University v. Shalala*, 512 U.S. 404, 512 (1994). In that the Court does not find the "lines of sight comparable" language contained in current Section 4.33.3 to encompass particular viewing angles or distance from the screen as the DOJ asserts, the Court does not agree with the government that Cinemark's theaters violate the lines of sight comparable

phrase in Section 303(a) of the ADA and 28 C.F.R. Subpart D and Standard 4.33.3 by failing to place wheelchair accessible seating in the stadium-style portion of its theaters.

The Court also does not find that Cinemark's placement of the wheelchair seating in its theaters violates the "integral part" requirement of Section 4.33.3. The Court does not find that the legislative record shows that the integral part requirement pertains to particular viewing angles. In its Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, the DOJ explained integration of wheelchairs not in terms of having viewing angles better than 50% of the seats in an assembly area, but in terms of wheelchair patrons being able to sit near family and friends. *See* 28 C.F.R. Part 36, App. B § 36.308 ("Individuals who use wheelchairs historically have been relegated to inferior seating in the back of assembly areas separate from accompanying family members and friends. The provisions of § 36.308 are intended to promote integration and equality in seating.") Cinemark's theaters do not place wheelchair patrons in the back of the assembly area apart from family and friends.

For the reasons stated above and those stated by the Fifth Circuit in *Lara*, the Court does not find that Cinemark's theaters violate Section 303 of the ADA and its implementing regulations.

The Court also does not find that Cinemark's theaters violate Section 302 of the ADA. The Court agrees with Cinemark that it would be illogical and unfair to find a violation of Section 302 of the ADA based on the design and

construction of a public accommodation where the accommodation has been shown to comply with Section 303 of the ADA and all of the technical requirements of the ADAAG (which was promulgated for the very purpose of assisting covered entities in understanding their responsibilities with respect to the design and construction of new facilities). The government maintains that compliance with Section 303 is not always sufficient to comply with all of the mandates of Title III. It maintains, for example; that it would be absurd to find that an owner or operator complied with all aspects of the ADA because it designed and constructed its facility in full compliance with all relevant technical guidelines where the owner or operator denies persons who use wheelchairs access to the facility. (Gov. Rep. in Supp. at 6.) This example is not relevant here. Here, the government's Section 302 claim is based on the design and construction of Cinemark's stadium-style theaters, not on allegations its has denied wheelchair patrons access to its facilities. The ADAAG sets forth the standards for the design and construction of new facilities in order to satisfy the ADA. *See* 42 U.S.C. § 12183(1); 42 U.S.C. § 12204. Thus, compliance with Section 303 and the ADAAG demonstrates compliance with the Section 302 in the context of the allegations here. The government has cited no authority supporting the position that a violation of Section 302 may exist based on the design and construction of a facility where the facility complies with Section 303 and the ADAAG.

As the Court does not find that the government has shown that Cinemark's theaters violate either Sections 302 and 303 of the ADA and their implementing regulations as a matter of law, the government's motion for partial summary judgment is denied.

This leaves Cinemark's motion for summary judgment. Cinemark contends summary judgment in its favor is appropriate with respect to all of its stadium-style multiplexes across the nation because the DOJ's claims in this lawsuit are predicated on the same "litigating position" rejected by the Fifth Circuit in *Lara*, and "all of Cinemark's movie theaters meet the accessibility criteria held by the Fifth Circuit to be legal," *i.e.*, that wheelchair accessible seating provides nonobstructed views of the screen in seating amidst seating for the general public. (Cinemark Mot. in Supp. at 11.) Cinemark relies on the affidavit testimony of its Vice President of Design and Construction, Don Harton. (Def. App. Ex. A.) In paragraph 7 of his affidavit, Mr. Harton states:

> The wheelchair-accessible seating locations at all of Cinemark's stadium-style movie theaters provides wheelchair-using patrons with unobstructed views of the screen. The wheelchair seating is located amidst general public seating in all but nine of Cinemark's multiplexes (covering a total of 52 auditoria). The wheelchair seating in these 52 auditoria is located on the first row of the movie theater and adjoins general public seating. A summary review of "as-built" designs produced to the DOJ shows this to be true, and I also know this to be true due to my position with Cinemark and personal visits to many of these movie theaters.

(Harton Aff. ¶ 7.)

The government does not point to evidence (or indeed even argue) in its opposition brief that Mr. Harton's statement

is incorrect or that some or all of Cinemark's theaters fail to provide wheelchair patrons unobstructed views of the screen.[4] The government moved, however, in a separate motion to strike paragraph 7 of Harton's affidavit and other evidence submitted by Cinemark. (Docket no. 75.) The government contends that paragraph 7 of Mr. Harton's affidavit should be stricken because the phrase "unobstructed views of the screen" as used by the Fifth Circuit in Lara has a specialized legal meaning requiring expert testimony, and Mr. Harton is not qualified as an expert in accessibility issues and the application of the ADA. The government contends that Mr. Harton's opinions regarding the phrase unobstructed views are "legal conclusions and go beyond Mr. Harton's capacity to testify as a lay witness." (Br. in Supp. of Mot. to Strike at 6.)[5]

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4. The government's position in its opposition brief, as it was in support of its own motion for summary judgment, is that the *Lara* decision is incorrect, and the integration and comparable lines of sight phrases in Section 4.33.3 require Cinemark to provide wheelchair accessible seating in the stadium-style sections of its theaters and viewing angles equivalent or better than 50% of the seats. (Gov. Opp. at 5, 7-8.) As stated above, this Court does not agree with the government's interpretation of Section 4.33.3.

5. The government further states that if the Court accepted the Fifth Circuit's interpretation of the comparable lines of sight requirement in Section 4.33.3 (*i.e.*, that wheelchair bound patrons must be afforded "unobstructed views of the screen"), the parties would still need to litigate precisely what it means to have an "unobstructed view of the screen," and the Court ultimately would decide the legal definition of the phrase. (Govt. Rep. to Mot. to Strike at 4.)

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The government cites no authority supporting the proposition that the phrase "unobstructed views of the screen" has some sort of specialized legal meaning requiring expert testimony. This Court finds that it does not. The Court finds Mr. Harton's opinions admissible under Fed. R. Evid. 701 ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of . . . a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.") Fed. R. Evid. 701. Mr. Harton is Cinemark's Vice President of Design and Construction and states, based on the as-built reviews of the theaters provided to the DOJ and his personal visits to many of Cinemark's theaters, that all of Cinemark's theaters afford wheelchair patrons unobstructed views of the screen. This is appropriate summary judgment evidence.

If the government believes that Mr. Harton's observations are incorrect or that some or all of Cinemark's theaters fail to afford wheelchair patrons "unobstructed views of the screen," then it is the government's obligation to come forward on summary judgment with evidence sufficient to create an issue of fact on that point. The government, however, does not point to any evidence indicating (indeed, the government does not argue) that some or all of Cinemark's stadium-style theaters provide wheelchair seating with obstructed views of the screen under any interpretation of the phrase. Thus, the government has not met its burden on summary judgment of demonstrating a genuine issue for trial on the question of obstruction.

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In that the government has not come forward with evidence sufficient to show that the wheelchair seating in any of Cinemark's theaters suffers from an obstructed view, this Court finds summary judgment in Cinemark's favor appropriate under *Lara* as to all of Cinemark's theaters where the wheelchair seating is located amidst seating for the general public. These theaters meet the criteria held by the Fifth Circuit in *Lara* to satisfy Title III of the ADA and include all of Cinemark's theaters except the nine multiplexes, or 52 auditoria, which Mr. Harton states position wheelchair seating in the first row of the movie theater *adjoining* general public seating. (*See* Harton Aff. ¶ 7.) With respect to these nine multiplexes, Cinemark acknowledges that the wheelchair seating is not located "amidst" general public seating as found in *Lara*. And Cinemark states:

> The fact that wheelchair seating in these [52] auditoria adjoins general public seating but is not located amidst public seating implicates dicta in *Lara* that admittedly creates some ambiguity as to whether deferring to *Lara* would be dispositive as to these auditoria.

(Cinemark Mem. at 11, n. 3.) Cinemark asserts, however, that the "amidst-adjoins distinction is immaterial" and summary judgment is appropriate with respect to these nine multiplexes because the Fifth Circuit held in *Lara* that the phrase "lines of sight comparable" in Section 4.33.3 did not require anything more than that theaters provide wheelchair-bound patrons unobstructed views of the screen. *Id.*

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While the Court recognizes that the government asserts violations of the comparable lines of sight requirement *and* the "integral part of any fixed seating plan" requirement of Section 4.33.3 in this case (whereas the plaintiffs in *Lara* apparently alleged only a violation of the lines of sight requirement), the Court does not fired the "amidst-adjoins" distinction material. The government does not address the distinction in its opposition brief, and does not argue or explain how the distinction is relevant to any of the claims its alleges here. Accordingly, the Court finds summary judgment in Cinemark's favor appropriate as to all of its stadium-style theaters, including its theaters where the wheelchair seating is located in the first row of the theater adjoining general public seating.

Conclusion

For the reasons stated above, Plaintiffs' motion for partial summary judgment (docket no. 78) is DENIED. Defendant's Second Motion for Summary Judgment (docket no. 70) is GRANTED.

IT IS SO ORDERED.

s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: November 19, 2001

APPENDIX C — MEMORANDUM OPINION AND ORDER, AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED AND FILED MARCH 22, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1: 99 CV 0705

JUDGE DONALD C. NUGENT

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINEMARK USA, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiff United States of America's Motion to Dismiss Defendant Cinemark's Counterclaim (Doc. #20). For the reasons stated below, Plaintiff's Motion to Dismiss Defendant's Counterclaim is GRANTED.

Appendix C

Factual and Procedural History

Plaintiff United States of America filed this civil action on March 24, 1999, against Defendant Cinemark USA, Inc., alleging that Defendant has violated and continues to violate Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189.

The factual and procedural history has been laid out previously by this Court in *United States v. Cinemark USA, Inc.*, 66 F. Supp.2d 881, 883-84 (N.D. Ohio 1999). As noted, the Department of Justice (DOJ), in July of 1998, filed an *amicus curiae* brief in *Lara v. Cinemark, USA*, EP-97-CA-502-H (W.D. Tex.), a lawsuit brought by individuals with disabilities and two advocacy groups alleging that Defendant's stadium-style movie theaters violated the ADA. In its brief, the DOJ argued that Defendant's theaters violated a 1991 ADA regulation that requires wheelchair users to be provided with wheelchair areas that "provide people with physical disabilities . . . lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, app. A, § 4.33.3.

Defendant attempted to join the DOJ as a party to the litigation in order to assert counterclaims under the APA. The *Lara* court denied Defendant's joinder request, and thereafter, granted partial summary judgment in favor of the *Lara* plaintiffs, finding that Defendant violated the ADA and ordering Defendant to retrofit 18 of its theaters. Defendant filed an appeal, which is still pending.

Appendix C

In this Court's prior Opinion (Doc. #15), the Court denied Defendant's Motion to Dismiss, Transfer, or Stay. Subsequently, Defendant filed its Answer and included a Counterclaim with five causes of action (Doc. #17). The causes of action allege: (1) violations of the Administrative Procedure Act (APA); (2) a violation of the United States Constitution; (3) a prayer for a declaratory judgment; and, (4) a violation of the Federal Register Act (FRA). Thereafter, Plaintiff, on November 18, 1999, filed a Motion to Dismiss[1] Defendant's Counterclaim. Defendant filed a Response on December 10, 1999, to which Plaintiff filed a Reply on December 21, 1999.

Motion to Dismiss Standards

Where subject matter jurisdiction is challenged pursuant to Federal Rule of Civil Procedure 12(b)(1), the party asserting jurisdiction (the plaintiff or, here, the counter-plaintiff) has the burden of proving jurisdiction in order to survive the motion to dismiss. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). "Moreover, the court is empowered to resolve factual disputes when subject matter jurisdiction is challenged." *Id.* (citation omitted). When a party has moved under both 12(b)(1) and 12(b)(6), the court considers the 12(b)(1) motion first, since the 12(b)(6) challenged becomes moot if the court lacks jurisdiction. *Id.*

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1. Plaintiff does not specify by which subsection under Federal Rule of Civil Procedure 12(b) it moves for dismissal. Both parties seem to be allergic to citing the specific rules under which they move and the appropriate standards for those rules. *See Cinemark*, 66 F. Supp. 2d at 884. The Court assumes that Plaintiff moves for dismissal under both 12(b)(1) and (6).

Where a court reaches the 12(b)(6) motion, it will dismiss a claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Bloch v. Riber*, 156 F.3d 673, 677 (6th Cir. 1998) (quotes and citation omitted). The court "must construe the complaint in a light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995).

Discussion

I. Administrative Procedure Act Claim

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983), *quoted in Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348, 1351 (6th Cir. 1989). "Such a waiver of sovereign immunity must be clear, express, and unambiguous." *Beamon v. Brown*, 125 F.3d 965, 967 (6th Cir. 1997) (inner quotes and citations omitted). Plaintiff argues that Defendant cannot bring suit against the United States because the government has not waived its sovereign immunity. Defendant argues that immunity is waived under the APA.

Although the APA provides a broad waiver of immunity for persons wronged by an agency action, *see* 5 U.S.C. § 702, the waiver, and thus judicial review, is limited to

(1) an agency action "made reviewable by statute"[2] or (2) "a final agency action for which there is no other adequate remedy in a court[.]" 5 U.S.C. § 704.[3] *See Beamon*, 125 F.3d at 967.

Defendant argues that, by way of its *amicus* brief in the *Lara* litigation and subsequent correspondence, the DOJ has promulgated a new "rule" under the guise of an "interpretation" of § 4.33.3. Defendant asserts that this new "rule" is final agency action. Plaintiff contends that its actions of interpreting its own regulations in the context of carrying out its enforcement mandate, *see* 42 U.S.C. § 12188, is not "final agency action" subject to suit under the APA.

"Agency action" is defined by the APA as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]" 5 U.S.C. § 551(13). "As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process . . . --it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow[.]'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). An agency action is nonfnal if it "does not itself adversely

2. There is no argument that the relevant administrative agency statutory provisions directly provide for judicial review.

3. Judicial review is also not available where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

affect complainant but only affects his rights adversely on the contingency of future administrative action." *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939).

In addition to the requirement that the agency action be "final," "the APA by its terms independently authorizes review only when 'there is no other adequate remedy at court,' 5 U.S.C. § 704." *Bennett*, 520 U.S. at 161-62. Thus, even if an agency action could be construed as "final," "the APA does not express the U.S. government's consent to suit if an alternate adequate remedy is available to review a final agency action." *Beamon*, 125 F.3d at 967.

(a) Final Agency Action

The question at hand is whether the DOJ's amicus brief, filed on behalf of private litigants, and subsequent party to party correspondence constitute final agency action. Regarding this precise issue, a magistrate judge in Texas, *Cinemark v. United States Dep't of Justice*, 99 CV 0183, and a district court in California, *United States v. AMC Entertainment*, 99 CV 1034, have issued thoughtful opinions, coming down on different sides of the coin: the magistrate judge concluded that the DOJ's actions constituted final agency action, while the district court decided that the DOJ's actions were not final.

As the Supreme Court has stated, in order to be final the "action must mark the 'consummation' of the agency's decisionmaking process[.]" *Bennett*, 520 U.S. at 177-78 (citation omitted). The agency's rules, orders, or regulations must be the "'definitive' statements of the [agency's]

position" and must have a "'direct and immediate . . . effect on the day-to-day business' of the complaining parties." *Federal Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 239 (1980) (citations omitted). In addition, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow[.]'" *Bennett*, 520 U.S. at 178 (citation omitted). The agency's actions must have "had 'the status of law' and 'immediate compliance with their terms was expected.'" *Standard Oil*, 499 U.S. at 239.

Defendant argues that "the rationale behind the 'finality' requirement is essentially one of ripeness[.]" While the doctrines of finality, ripeness, and exhaustion' are often "difficult to distinguish," if an agency action lacks finality, as required by the controlling statute, then "a court lacks subject matter jurisdiction." *American Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999) (citations omitted). Finality is different, and more foundational, than ripeness; an agency action may be final without being ripe for review. *Id.* at 291 n.9. However, if an action is not "final agency action for which there is no other adequate remedy", it simply is beyond the purview of an Article III court of limited jurisdiction. *Beamon*, 125 F.3d at 967.

Plaintiff argues that its *amicus* brief and subsequent letters do not constitute final agency action. Defendant responds that the DOJ's enforcement actions, correspondence to Defendant and others that they comply with the ADA, and several *amicus* briefs constitute final agency action. Because they do not meet the requirements of finality, Plaintiffs filing of complaints in their enforcement actions; correspondence

discussing settlement or alleged violations of the ADA; and, amicus briefs are not "final" agency actions.[5]

Regarding whether the filing of a complaint is final agency action, the Sixth Circuit has held that "it is clear that

4. The proper procedure for pursuit of a grievance over an agency rule is to petition the agency for the issuance, amendment, or repeal of a rule, 5 U.S.C § 553(e), denial of which must be justified by a statement of reasons, § 555(e), and can be appealed to the courts, §§ 702, 706. Defendant does not assert that it petitioned the Attorney General for amendment or repeal of the DOJ's alleged rule. Thus, even if Plaintiffs actions could be considered "final" agency actions, Defendant has failed to exhaust its administrative remedies.

5. Where an agency's enforcement mandate directs the agency to seek judicial review of an alleged violation of the federal law, such "action" may not even be "agency action" as defined by the APA. It does not easily fall under the definition of an agency "rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]" 5 U.S.C. § 551(13). The closest definition that may describe such action is that of a "rule" which means "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]" 5 U.S.C. § 551(4). Although the DOJ has, in the *Lara* litigation, recited language that its "interpretation" is entitled to deference, when an agency brings an enforcement action it is not implementing, interpreting, or prescribing law or policy, but rather enforcing the applicable law. *See* 42 U.S.C. § 12188(b)(1)(B) (directing the Attorney General to commence a civil action in any appropriate district court if she has reasonable cause to believe that a violation of the ADA has occurred). Further, such enforcement action is not intended for "future effect," but rather to enforce past and/or continuing discrimination. *But see Standard Oil*, 449 U.S. at 238 n.7 (noting that the filing of a complaint is agency action, but not final agency action).

the act of filing a complaint is interlocutory and not 'final.'" *First Nat'l Monetary Corp. v. Commodity Futures Trading Comm'n*, 677 F.2d 522, 525 (6th Cir. 1982) (equating "final agency action" with "final decision" under 28 U.S.C. § 1291). *See also Greater Cincinnati Chamber of Commerce v. United States Environmental Protection Agency*, 879 F.2d 1379, 1382 (6th Cir. 1989) (citing with approval a case in which an interpretation of an agency regulation, request for data, and amendment of a complaint in an enforcement action were not final actions subject to judicial review); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1170 (6th Cir. 1983) (noting that an announcement of an investigation, an enforcement policy, or the issuance of a complaint "are generally not reviewable in court").

In *Standard Oil*, the Supreme Court held that the FTC's issuance of a complaint averring that there was "reason to believe" that a party was in violation of the Federal Trade Commission Act was insufficient to satisfy the finality requirement. *Standard Oil*, 449 U.S. at 239-43. The Court explained that "reason to believe" was merely a prerequisite to a definitive agency position and is itself a determination only that adjudicatory proceedings would commence. *Id.* at 241. The Court further stated that, although the complaint imposed on the defendant the substantial burden of responding to the charges made against it, the complaint did not have any direct effect on defendant's daily business, nor did it have any legal force compelling a party to do something or refrain from doing something. *Id.* at 242.

In the matter at hand, not only is the Complaint not final agency action, but the DOJ's "reason to believe" that

Defendant is violating the ADA is merely a determination that, failing settlement, adjudicatory proceedings will commence. This is particularly true for the DOJ under this Act. The DOJ has no inherent power under the Act to adjudicate. Unlike many other agencies, it has no power to issue fines or to order a violator to do, or not do, some act. When the Attorney General has reasonable cause to believe that any person or group is engaged, or has been engaged, in discrimination under the ADA, her only recourse is to commence suit in district court. 42 U.S.C. § 12188(b)(1)(B). Any order for relief, damages, or levying of a fine can only be made by the district court, and not by the Attorney General. 42 U.S.C. § 12188(b)(2). If the Court were to adopt Defendant's position, the United States and the Attorney General would be subject to suit any time the Attorney General initiated an investigation or filed a complaint based on the belief that some party was unlawfully discriminating against persons with disabilities. This is an untenable position which this Court declines to adopt. *See Standard Oil*, 449 U.S. at 239 ("The Commission's issuance of its complaint was not 'final agency action.'").

In addition to not being the consummation of the agency's decisionmaking process, the DOJ's actions are not actions whereby "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett*, 520 U.S. at 178 (citation omitted). The DOJ has reason to believe that Defendant is violating the ADA. As such, it has engaged in settlement negotiations and has threatened, and now instituted, litigation. The DOJ's actions have not determined rights or obligations and are not such actions from which legal consequences flow. Rights and

obligations, and legal consequences, will be determined, if at all, by this Court. Comparing a case whereby a manufacturer, under penalty of criminal and civil penalties for noncompliance, was forced to change all their labels, advertisements, and promotional materials, and destroy stock and invest in new supplies, the Supreme Court stated that the issuance of a complaint does not have any such legal or practical effect. *Standard Oil*, 499 U.S. at 242. While the DOJ assuredly desires immediate compliance with their settlement terms and demand letters, such terms do not have "the status of law." *Id.* at 239. This Court recognizes, as did the *Standard Oil Court*, that the burden of litigation is often substantial. However, this burden is "different in kind and legal effect" from the burdens of what is properly considered final agency action. *Id.* at 242.

If filing a complaint is not final agency action, then the prior acts leading up to the filing of that action, including letters questioning the legality of Defendant's actions, threats of litigation, and investigation of Defendant's properties are not final agency action. *See Veldhoen v. United States* Coast *Guard*, 35 F.3d 222, 225 (5th Cir. 1994) ("An agency's initiation of an investigation does not constitute final agency action."); *Dow Chemical Co. v.* EPA, 832 F.2d 319, 325 (5th Cir. 1987) (holding "allegation made in enforcement suit does not impose the *kind* of legal obligation with which the finality doctrine is concerned"); *New Jersey Hosp. Ass'n v. United States*, 23 F. Supp. 2d 497, 500 (D.N.J. 1998) (holding that the DOJ's settlement letters do not constitute final agency action).

Following the reasoning articulated above, Plaintiff's *amicus* briefs are also not final agency action. "Agency action in a judicial proceeding is obviously not such agency action as would be subject to review under the Administrative Procedure Act." *Mt. Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1990). Much like the filing of a complaint, the filing of an amicus brief by an agency whose mandate it is to enforce the Act at issue is not final agency action because an amicus brief, by itself, does not determine "rights or obligations" and is not such an action from which "legal consequences will flow." *Bennett*, 520 U.S. at 178. Rather, where the agency cannot issue its own orders or fines, it is the domain of the courts to determine rights and obligations.

Far from having "the status of law," *Standard Oil*, 499 U.S. at 239, an *amicus* brief by a government agency is not even required to be accepted or heard in district court, unlike the court of appeals. *See* FED. R. APP. P. 29, And, as further evidence that such advocacy does not determine rights or obligations or rise to the status of law, many courts have held that when an agency attempts to add to its interpretation in litigation, the agency will receive little to no deference[6] for its advocacy interpretation. *See, e.g., Granutec, Inc. v. Shalala*, 139 F.3d 889

6. Usually, courts must "give substantial deference to an agency's interpretation of its own regulations" and may only overturn that interpretation if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *St. Francis Health Care Centre v. Shalala*, __ F.3d __, 2000 WL 217732, at *5 (6th Cir. Feb. 25, 2000) (citations and quotes omitted). The differences between a non-litigation position and a litigation position may align with the differences between final and non-final agency action. Thus, a non-litigation position is the "agency's fair and considered

(Cont'd)

(table), 1998 WL 153410, at *9 (4th Cir. Apr. 3, 1998) (stating that positions adopted by an agency solely for litigation do not deserve deference as they may well be merely the posture of litigation counsel and not the thoughtful judgment of the agency); *Appalachian States Low Level Radioactive Waste Comm'n v. Pena*, 126 F.3d 193, 198 (3d Cir. 1997) ("No deference is due an agency's litigation position."); *Paralyzed Veterans of America v. D.C Arena L.P.*, 117 F.3d 579, 589 (D.C. Cir. 1997) (questioning if any deference is due to an agency's position in *amicus* brief); *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) ("No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position."). Of course, when the agency's position pre-dated the litigation, or when a court requests that an agency file an *amicus* brief, the agency's position is entitled to deference because the agency's position is not a post-hoc rationalization advanced by an agency to defend past agency action. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *National Wildlife Fed'n v Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997).

(Cont'd)

judgment on the matter in question", *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (emphasis added), *i.e.*, the agency's consummate decision wluch determines rights and obligations and has the status of law--and therefore represents the agency's final action which is entitled to deference. Whereas, a litigation position is "interlocutory and not fnal," *First Nat'l Monetary Corp.*, 677 F.2d at 525, represents the posture of litigation counsel, does not determine rights and obligations, and does not have the status of law--and therefore represents nonfinal agency action which is neither entitled to deference nor can be the basis for suit under the APA. *See Mt. Adams Pioneer Co.*, 896 F.2d at 343; 5 U.S.C. § 704.

In light of the preceding discussion, the Court finds that Plaintiff's enforcement actions, the filing of complaints and *amicus* briefs, and their correspondence discussing settlement, alleged violations of the ADA, or threats of litigation are not "final" agency actions. Thus, the APA waiver of sovereign immunity does not apply to Defendant's APA counterclaim and this Court lacks jurisdiction over it. Defendant's APA counterclaim is dismissed.

(b) Alternate Adequate Remedy

Even if it could be assumed that the DOJ's actions were final agency actions, Defendant's APA counterclaim must be dismissed because there is an adequate remedy in a court: Defendant may assert a violation of the APA as a defense to the DOJ's enforcement action against it: 5 U.S.C. § 704. Where an alternate adequate remedy is available to review a final agency action "the APA does not express the U.S. government's consent to suit[.]" *Beamon*, 125 F.3d at 967.

II. Other Counts

Defendant also asserts counts against the United States for a constitutional violation "of Cinemark's basic due process rights and in circumvention of other Constitutional safeguards" (Def's Ans. and Counterclaim at 17); a declaratory judgment pursuant to 28 U.S.C. § 2201; and, a violation of the Federal Register Act (FRA), 44 U.S.C. §§ 1501-11.

As discussed above, "[t]he doctrine of sovereign immunity acts as a bar to suit against the United States unless there has been an explicit waiver by the government."

Nuclear Transport, 890 F.2d at 1351. Although the United States has consented to suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), that Act is inapplicable to Plaintiffs counterclaims "because it does not reach alleged due process and other federal constitutional torts." Jackson v. *United States*, 114 F.3d 1187 (table), 1997 WL 321123, at *2 (6th Cir. June 11, 1997) (citing *FDIC v Meyer*, 510 U.S. 471, 477-78 (1994)). *See also Kurinsky v. United States*, 33 F.3d 594, 599 (6th Cir. 1994) (noting that the United States has not waived its immunity for alleged constitutional due process violations except for those monetary claims not sounding in tort under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491).[7]

Defendant's counterclaims under the Declaratory Judgment Act and the FRA fail because these Acts do not contain an explicit waiver of the sovereign's immunity, and, having found no jurisdiction under the APA or FTCA, the declaratory judgment and FRA claims cannot be bootstrapped by the waivers contained in those acts.[8]

---

7. Defendant's due process counterclaim is also insufficient under the FTCA because Defendant did not exhaust its administrative remedies, *see* 28 U.S.C. § 2675(a), and the claim appears to fall within the confines of the "discretionary function exception." *See* 28 U.S.C. § 2680(a); *Lundstrum v. Lyng*, 954 F.2d 1142, 1145 (6th Cir. 1991).

8. In addition, Defendant has failed to state a claim under the FRA because it has had actual knowledge of § 4.33.3, the 1991 provision the United States is attempting to enforce in this action. Additionally, even if the DOJ's interpretation in its amicus brief was determined to be a legislative rule, subject to notice and comment rulemaking, Defendant had actual knowledge of the DOPs interpretation several months before the DOJ filed thus suit.

Appendix C

Conclusion

For the foregoing reasons, Plaintiff United States of America's Motion to Dismiss Defendant Cinemark's Counterclaim (Doc. #20) is GRANTED in its entirety.

IT IS SO ORDERED.

s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: March 22, 2000

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1: 99 CV 0705

JUDGE DONALD C. NUGENT

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINEMARK USA, INC.,

Defendant.

JUDGMENT

Pursuant to a Memorandum Opinion and Order of this Court, Plaintiff United States of America's Motion to Dismiss Defendant Cinemark's Counterclaim (Doc. #20) is GRANTED in its entirety.

IT IS SO ORDERED.

s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: March 22, 2000

APPENDIX D — STATUTORY PROVISIONS AND REGULATIONS INVOLVED

CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 U.S.C. § 12183

§ 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term

Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

> **(1)** a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter;

* * * *

Appendix D

42 U.S.C. § 12186

§ 12186. Regulations

* * *

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) Consistency with ATBCB guidelines

Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards

(1) Facilities

If final regulations have not been issued pursuant to this section, for new construction or alterations for which a

valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

* * * *

Appendix D

42 U.S.C. § 12204

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter.

* * * *

Appendix D

42 U.S.C. § 12206

§ 12206. Technical assistance

(a) Plan for assistance

(1) In general

Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) Publication of plan

The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of Title 5 (commonly known as the Administrative Procedure Act).

* * * *

Appendix D

AMERICANS WITH DISABILITIES ACT ACCESSIBILITY GUIDELINES

4.33.3 Placement of Wheelchair

Locations. Wheelchair areas shall be an integral part of any fixed seating plan and shall be *provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.* They shall adjoin an accessible route that also serves as a means of egress in case of emergency. *At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.*

EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

* * * *

Appendix D

PROPOSED RULES

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Parts 1190 and 1191

[Docket No. 99–1]

RIN 3014–AA20

Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines

Tuesday, November 16, 1999

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) is proposing to revise and update its accessibility guidelines for buildings and facilities covered by the Americans with Disabilities Act of 1990 (ADA) and the Architectural Barriers Act of 1968 (ABA). These guidelines cover new construction and alterations and serve as the basis for enforceable standards issued by other Federal agencies. As a result of this revision and update,

the guidelines for the ADA and ABA are consolidated in one Code of Federal Regulations part. The guidelines for the ABA also cover buildings and facilities leased by Federal agencies. The Department of Justice and the Department of Transportation are responsible for issuing standards based on the Access Board's guidelines under the ADA. ABA standards are issued by the Department of Defense, General Services Administration, the Department of Housing and Urban Development, and the U.S. Postal Service.

* * *

The Board is aware of the Department of Justice's enforcement of 4.33.3 with respect to assembly areas with stadium-style seating. DOJ has stated that 4.33.3 requires that wheelchair areas be an integral part of any fixed seating plan, and be proved so that people with disabilities have lines of sight and choice of admission prices comparable to those for other members of the general public. As applied to stadium-style theaters (where most seats are placed on tiers or risers to enhance viewing), DOJ has asserted in attempting to settle particular cases that wheelchair seating locations must: (1) Be placed within the stadium-style section of the theater, rather than on a sloped floor or other area within the auditorium where tiers or risers have not been used to improve viewing angles; (2) provide viewing angles that are equivalent to or better than

the viewing angles (including vertical, horizontal, and angle to the top of screen) provided by 50 percent of the seats in the auditorium, counting all seats of any type sold in that auditorium; and (3) provide a view of the screen in terms of lack of obstruction (e.g., a clear view over the heads of other patrons), that is in the top 50 percent of all seats of any type sold in the auditorium. The Board is considering whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters.

* * * *

Appendix D

TEXAS ACCESSIBILITY STANDARDS

4.33.3 Placement of Wheelchair Locations. Wheelchair areas shall be an integral part of any fixed seating plan and shall be dispersed so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for *other* members of the audience. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to *(shoulder-to-shoulder)* each wheelchair seating space. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

APPENDIX E — DRAFT FINAL ADA AND ABA ACCESSIBILITY GUIDELINES DATED APRIL 2, 2002

Draft final ADA and ABA Accessibility Guidelines
April 2, 2002

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Parts 1190 and 1191

* * *

Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines

AGENCY: Architectural and Transportation Barriers Compliance Board.

* * *

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board is revising and updating its accessibility guidelines for buildings and facilities covered by the Americans with Disabilities Act of 1990 (ADA) and the Architectural Barriers Act of 1968 (ABA). These guidelines cover new construction and alterations and serve the basis for enforceable standards issued by other Federal agencies. The ADA applies to places of public accommodation, commercial facilities, and State and local government facilities. The ABA covers facilities designed,

built, altered, or leased with Federal funds. As a result of this revision and update, the guidelines the ADA and ABA are consolidated in one Code of Federal Regulations part.

* * *

221.2.3 Lines of Sight and Dispersion. *Wheelchair spaces* shall provide lines of sight complying with 802.2 and shall comply with 221.2.3. In providing lines of sight, *wheelchair spaces* shall be dispersed and shall provide spectators in *wheelchair spaces* with a range of seating locations and viewing angles substantially equivalent to, or better than, the range of seating locations and viewing angles available to all other spectators.

* * * *

APPENDIX F — BUILDING CODE CERTIFICATION DATED SEPTEMBER 27, 1996

FOR IMMEDIATE RELEASE
FRIDAY, SEPTEMBER 27, 1996

CR
(202) 616-2765
TDD (202) 514-1888

TEXAS RECEIVES BUILDING CODE CERTIFICATION

WASHINGTON, D.C. — Builders in Texas who follow state building codes can be assured that they are complying with federal guidelines as well, now that the Justice Department has certified Texas codes as being in compliance with the Americans with Disabilities Act (ADA).

Texas is only the second state in the nation to receive such certification. Washington state codes were certified in March 1995.

"Everyone in the state of Texas – builders, architects, business owners, and the general public – will benefit from Texas' new accessibility standards," said Assistant Attorney General for Civil Rights Deval L. Patrick. *"Certification makes it easier to comply with the law."*

Under the ADA's Standards for Accessible Design, newly constructed or altered public and commercial facilities must be built to be accessible to people with disabilities. States may now apply for certification by the Justice Department if their building codes are equivalent to the federal guidelines. Builders will benefit from this new process because it ensures that construction which meets state codes meets the requirements of the ADA. Builders will also have additional legal protection in ADA lawsuits if they build in compliance with the certified code.

APPENDIX G — EXCERPTS FROM DEPARTMENT OF JUSTICE, CERTIFICATION OF STATE AND LOCAL BUILDING CODES

DEPARTMENT OF JUSTICE

CERTIFICATION

OF

STATE AND LOCAL BUILDING CODES

* * *

Why is Certification Important?

A major part of the effort to implement the ADA relies on voluntary compliance by businesses. Code certification facilitates voluntary compliance by putting ADA requirements and local requirements into a single, readily available document. It allows builders to rely on their local inspection and approval processes, and it ensures that accessibility will be routinely considered in those processes. It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA. By meshing local processes with Federal requirements, certification makes accessibility part of the process, not an afterthought.

* * *

Appendix G

On Sept 23, 1996, the DOJ certified that the Texas Accessibility Standards meet or exceed the requirements of the ADA Standards for Accessible Design.

* * * *

APPENDIX H — EXCERPTS FROM THE AFFIDAVIT OF LAURA M. FRANZE DATED APRIL 26, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:99-CV-0183-L

CINEMARK USA, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

AFFIDAVIT OF LAURA M. FRANZE

* * *

3. Immediately after Cinemark first received notice that DOJ was conducting an investigation based on (a) complaint(s) about wheelchair seating at three of Cinemark's theaters in Texas (including Tinseltown in El Paso), I, on behalf of Cinemark, requested a meeting with DOJ's designated representative in the investigation, Edward Miller. Mr. Miller represented that he is an attorney with the Disability Rights Section of the Civil Rights Division of the U.S. Department of Justice.

4. After telephone consultation with Mr. Miller, he agreed to a face-to-face meeting at his office in Washington, D.C. at 10:00 a.m. on March 5, 1998.

5. At that meeting, I asked Mr. Miller whether Defendant's blueprint configurations (which had been previously provided to Mr. Miller) showing wheelchair and general seating configuration for theaters in Pflugerville, El Paso (Tinseltown) and Pasadena, Texas, were in compliance with the ADA. Mr. Miller said, "we haven't taken a position on that." I then asked whether the Agency had taken a position on whether there was a minimum viewing angle for wheelchair seating. He said, "no, we have not." I asked whether the Agency was going to take a position on either of these issues. He said, "that's what this investigation was about – we haven't decided." I asked whether the Agency had ever taken a position on placement of wheelchair seating in a stadium theater. Mr. Miller said that DOJ had not taken a position other than 4.33.3. I asked whether there was any requirement that wheelchair seating had to a certain percentage of the way back from the screen." He said there was no official position. I asked whether there was an unofficial position. He said, "no." I asked whether the DOJ had ever taken a position on wheelchair viewing angles in any settlement or other document. He said, "no." I asked whether he could give Cinemark any guidance on the viewing angle requirements for wheelchair seating or seating configuration generally. He referred me to regulation 4.33.3. I asked whether 4.33.3 required a minimum viewing angle and he said that the DOJ had no official position on that. I asked whether Mr. Miller could provide Cinemark with any further clarification as to the DOJ's position on the meaning

of 4.33.3. Mr. Miller said, "no." I explained that Cinemark was still building theaters and Cinemark was interested in a safe harbor – i.e., a position that DOJ felt was clearly permissible under the law even if Mr. Miller could not give me the exact parameters. He said that he could add nothing to the law and the regulations – he repeated that DOJ had taken no position on the location or viewing angle of wheelchair seating within stadium movie theaters other than the law and 4.33.3.

* * * *

APPENDIX I — EXCERPTS FROM BRIEF OF *AMICUS CURIAE* UNITED STATES ON SUMMARY JUDGMENT ISSUES DATED JULY 21, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

CIVIL ACTION NO. EP-97-CA-502-H

CHIEF JUDGE HARRY LEE HUDSPETH

JOSÉ G. LARA, E.J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECH, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, AND MYRA MURILLO,

Plaintiffs

V.

CINEMARK USA, INC.,

Defendant.

BRIEF OF *AMICUS CURIAE* UNITED STATES ON SUMMARY JUDGMENT ISSUES

* * *

5. The SMPTE guideline, based on anthropmetric data and numerous studies, establishes that physical discomfort occurs when the vertical viewing angle to the top of the screen

exceeds +35 degrees, while the vertical range of "easy head movement" is +30 degrees. Exhibit 3 at 1-5. Physical discomfort also occurs when the horizontal line of sight exceeds +15 degrees in either direction. Exhibit 3 at 5.

6. The SMPTE Guideline also recognizes that "the normal line of sight to 12 to 15 degrees *below* the horizontal" (or -12 to -15 degrees) (emphasis added). Exhibit 3 at 5. Because of this, the "optimum viewing zone" is from horizontal at eye level (0 degrees) to -30 degrees. Exhibit 3 at 2, fig. 1. The SMPTE Guideline therefore recommends that, to avoid excessive vertical viewing angles and to bring the vertical viewing angle closer to zero degrees, seat backs should be tilted the same amount, 12 to 15 degrees. Exhibit 3 at 5.

* * *

. . . the Department of Justice interprets the language in the Standards requiring "lines of sight comparable to those for members of the general public" to mean that in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt. Wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be the best. Instead, consistent with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience equates that of members of the general public. In other words, to ensure that wheelchair users are provided lines of sight that are comparable to the viewing angles offered to the

general public, the lines of sight provided to wheelchair users should not be on the extremes of the range offered in the stadium. As described in the industry guidelines, "viewing angles" refers to vertical viewing angles, horizontal viewing angles and to other components that affect "lines of sight." *See* Exhibit 3 at 1-5.

* * * *

APPENDIX J — EXCERPTS FROM DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS DATED APRIL 2, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:99-CV-0183-L

CINEMARK USA, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

* * *

Under well-established Supreme Court and appellate precedent, the Department of Justice's actions challenged here — interpreting its regulations in the context of carrying out its enforcement mandate — are not "final agency action" subject to judicial review under the Administrative Procedure Act. Moreover, Cinemark will have a full opportunity to raise its objections to the Department of Justice's actions as defenses in the enforcement suit filed against it. Therefore, the Court does not have jurisdiction to hear this case.

* * * *

APPENDIX K — EXCERPTS FROM PETITIONER UNITED STATES' MOTION FOR A PROTECTIVE ORDER DATED APRIL 2, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No.

ORAL HEARING REQUESTED

United States of America,
U.S. Department of Justice
Civil Rights Division
Disability Rights Section
1425 New York Avenue, N.W.
P.O. Box 66738
Washington, D.C. 20035-6738

Petitioner,

V.

Cinemark USA, Inc.,
7502 Greenville Avenue,
Suite 800
Dallas, Texas 75231-3891

Respondent.

EXCERPTS FROM PETITIONER UNITED STATES' MOTION FOR A PROTECTIVE ORDER

* * *

Appendix K

Cinemark seeks discovery from the United States on two areas. First, Cinemark seeks discovery on purely legal issues: the regulatory requirements for wheelchair seating and wheelchair lines of sight under the ADA, the internal diliberative process and discretionary rulemaking functions in the Department's development of the regulations issued under the ADA, and the ADA certification by the Department of Texas state code's accessibility standards. Second, Cinemark seeks discovery on settlements the Department has entered into on these legal issues, seeking privileged information on negotiations and the litigation strategies in this and other cases.

This Court should grant the motion for a protective order and quash the notice of deposition. As shown more fully below, examination of this sort is not allowed, particularly when the government is not a party and the action does not challenge rulemaking. Further, such examination is prohibited, since it delves improperly into the deliberative processes of agency decision makers, and also seeks information from litigators about privileged material.

* * * *

APPENDIX L — EXCERPTS FROM PLAINTIFF UNITED STATES' RESPONSE AND OBJECTIONS TO DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS DATED MARCH 1, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO.1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff

V.

CINEMARK USA, INC.,

Defendant.

PLAINTIFF UNITED STATES' RESPONSE AND OBJECTIONS TO DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

The United States hereby responds and objects to Defendant Cinemark USA's First Request for Production of Documents and Things.

Appendix L

General Objections

The following General Objections are hereby incorporated into the United States' response to each of the following requests for production.

* * *

The United States also objects to these requests to the extent that they seek documents or information that is protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege, the law enforcement investigatory privilege, and any other applicable privilege and/or doctrine. The United States further objects to these requests to the extent that they seek discovery of materials already in Defendant's possession as such discovery is unduly burdensome. Subject to and without waiving any objections or privileges, the United States will produce all responsive and discoverable material related to wheelchair seating in stadium style movie theaters.

* * *

Request for Production No. 9:

All documents and other tangible things referring or relating to any DOJ interpretation(s) of JDSAD, Section 4.33.3 in the context of movie theaters, movie auditoriums, or movie complexes.

Response:

The United States objects to this request on the grounds that it seeks discovery related to defendant's counterclaim alleging violation of the APA, pending a ruling by the Court on the United States' Motion to Dismiss Defendant's Counterclaims and Defendant's Motion for Partial Summary Judgment on the counterclaim, and seeks discovery that is not legally permissible in APA-based actions. The United States further objects to this request on the grounds that it seeks disclosure of documents that are protected by the attorney-client privilege, the work product doctrine, the deliberative process privilege, and the law enforcement investigatory privilege. The United States additionally objects to this request on the grounds that it seeks disclosure of documents that are not relevant or likely to lead to the discoverability of admissible evidence and is overbroad. See also response and objections to Request for Production No. 8, incorporated herein. Subject to and without waiving any objections or privileges, the Department responds that all other relevant, nonprivileged documents responsive to this request are produced under Request for Production No. 8.

* * * *

APPENDIX M — EXCERPTED PLAINTIFF UNITED STATES' AMENDED BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED FEBRUARY 16, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. 1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff,

V.

CINEMARK USA, INC.,

Defendant.

PLAINTIFF UNITED STATES' AMENDED BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * *

Regardless, as a factual matter, the *Lara* brief is not inconsistent with prior interpretations of Standard 4.33.3. First of all, there are no such prior interpretations in the context of stadium-style theaters. As Cinemark itself acknowledges, prior to 1998 the Department of Justice had

never interpreted Standard 4.33.3 in the context of stadium-style theaters. *See* Cinemark Exh. L ¶ 5. The "historical pronouncements" on which Cinemark places such importance date to an era when stadium-style theaters did not even exist. *See* Cinemark Br. at 7. But as agencies can apply existing regulations to new facts without engaging in rulemaking at all, *see, e.g., Guernsey Mem. Hosp.*, 514 U.S. at 96, they cannot be bound by interpretations that may have been developed before those facts even existed. Similarly, the primary "pronouncement" on which Cinemark relies — an alleged oral statement from April 1991 — *pre-dates* the promulgation of Standard 4.33.3. *See* Cinemark Br. at 7, 18. Obviously, even if this reported oral statement were otherwise worthy of credence, the Department of Justice cannot be bound by alleged interpretations that pre-date the authority being interpreted.

* * * *

APPENDIX N — EXCERPTS OF AMICUS CURIAE BRIEF OF HOYTS CINEMAS CORPORATION FILED DECEMBER 1, 2003

No. 03-641

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF HOYTS CINEMAS CORPORATION IN SUPPORT OF PETITIONERS

* * * * * *

2. The DOJ's 1996 Helpline "Advice" to Hoyts About the Meaning of Section 4.33.3

When Hoyts first began designing and building stadium-style theaters in 1996, the only ADA-related resource available to Hoyts help interpret the meaning of Section

4.33.3 was the "Helpline" phone-in service provided by the DOJ for architects and other design professionals to obtain real-time architectural advice on how to comply with ADAAG. Lusher Dep. at 3a-4a. Hoyts' principal architect at that time was Arrowstreet, Inc. ("Arrowstreet"), which designed many of Hoyts' earliest stadium-style theaters. On behalf of Hoyts, Arrowstreet hired a code consultant firm, "Rolf Jensen Associates" ("RJA"), that provides guidance and technical advice about compliance with local and federal building-code regulations, including the ADA. See deposition testimony of Robert Carasitti, dated February 15, 2002 ("Carasitti Dep."), App. at 5a-6a.

In 1996, while working on the design of Hoyts Brassmill Connecticut theater complex, RJA's code consultant, Robert Carasitti, telephoned the "Helpline" to seek advice on where Section 4.33.3 required wheelchair seats to be placed in stadium-style theaters. Carasitti Dep., App. at 6a-7a. Mr. Carasitti's call was referred to Todd Anderson, a licensed architect employed by the DOJ whose duties including handling complex technical questions relating to ADA building requirements. Carasitti Dep., App. at 8a; Anderson Dep., App. at 13a-14a. Anderson told Carasitti that if Hoyts situated its wheelchair seats in the flat, *front section* of its proposed stadium-style theaters, those theaters would comply with Section 4.33.3. Carasitti Dep., App. at 10a; Anderson Dep., App. at 16a. Anderson testified that the advice he gave Carasitti was "consistent" with the advice about Section 4.33.3 that he was providing to the public generally at the time. Anderson Dep., App. at 16a. Mr. Carasitti relied upon his discussion with Anderson in advising Arrowstreet that their stadium theater designs for Hoyts complied with Section 4.33.3. Carasitti Dept., App. at 11a.

APPENDIX O — EXCERPTS FROM DEPOSITION OF TODD ANDERSEN DATED FEBRUARY 8, 2002

In The Matter Of:

United States of America v. Hoyts Cinemas Corporation, et al.

Todd Andersen
February 8, 2002

* * *

Q: That's an architectural firm?

A: It is. Second or third oldest in the city. In '87 Eisenberg sold his partnership to Haven. I chose not to work for Haven. Eisenberg and I and one other started our own firm in code consulting, '87 to '94; I was a partner in a firm that was variously named Eisenberg Associates and then later on Eisenberg, Andersen & Spinetto.

In '94 each of the three of us had new directions in our lives that we wished to pursue, and I became aware of a position at the Department of Justice that looked like it might be interesting. I applied and was accepted.

Q: And what was that position?

A: I forget what the heck they had on their job list, but to me it was architect.

Appendix O

Q: Was it for any particular section or division of the Department of Justice?

A: Civil Rights Division, Disability Rights Section. When I joined, it was not called the Disability Rights Section. I forget what it was called. It changed names in '96, I believe.

I stayed there through September of '98, moved back to the private sector with a firm — with whom I'm now employed, Rolf Jensen, R-o-l-f, Jensen & Associates.

* * *

Q: Does the DOJ — during the time that you were there, did it operate a technical assistance hot line?

A: They called it a help line, but they do.

Q: What was that?

A: As stated, a source of advice with respect to the Americans with Disabilities Act.

Q: And is that what the technical advisors did, is they manned that line?

A: They were the front line of that whole process. It was more than just them.

Q: Who was the backup? You say it was more than just them. Who else was involved?

A: There was an apparatus that created publications. There were other kinds of materials made available through typically the website, having to do with settlement agreements to which the section had entered.

Q: What was your role as a backup to these people?

A: When a question would come in that was more technical than they felt comfortable talking about, having to do with the built environment, I would get somewhere between — I don't know — 40 and 80 calls a week possibly bounced to me.

* * *

Q: Do you ever recall during that time period telling anybody who called in and asked you questions about 4.33.3's application to a stadium-style theater, that the wheelchair seats could be located in the sloped or flat section in the front part of the theater?

MR. PINEAULT: Would you read that question back, please.

*(Question read)

A: Yes.

Q: Do you have any specific recollection of the discussion on that subject?

A: I do not have a specific recollection. I've been shown a document purporting to record such a discussion. And this would have to be understood in the context of rooms less than 300 seats.

Q: Do you know a gentleman named Robert Carasitti or Bob Carasitti?

A: I do.

Q: Do you ever remember having any discussions with Bob Catasitti on the technical assistance hot line or at least on a call referred to you from the technical assistance hot line?

A: A couple. In detail, no. But I remember that Bob called me a number of times.

Q: Did you know Mr. Carasitti before getting those calls?

A: No. In fact, I've never met him face-to-face.

Q: Do you know whether he is affiliated with Rolf Jensen?

A: No. He's now in one of our competitor's firms. He's still in New England.

Q: Did there ever come a time when you had occasion to talk to Mr. Carasitti apart from the discussions that you had on these technical assistance hot line calls?

A: Subsequent to being involved with the DOJ, yes.

Q: When you came to Rolf Jensen?

A: That's correct.

Q: During that same time period, did you have any discussions with anybody calling in who asked you about the application of Section 4.33.3 to a stadium-style theater that was built for more than 300 people?

A: Yes.

Q: And with respect to those larger theaters, do you recall whether you ever said that it was acceptable to put the wheelchair locations in the front or sloped section — I'm sorry, in the sloped or flat section in the front of the theater, together with a few seats in the rear of the theater?

A: I don't remember that specifically as I sit here, but it would have been consistent.

Q: With the advice you were giving at that time?

A: Correct.

Q: Did there come a time — strike that. I would like to ask one more question on this line.

Did you ever give advice to these people to the effect that the stadium-style theater wheelchair seats might be located in the first row and still comply with 4.33.3?

A: For small rooms?

Q: For small theaters.

A: I believe I did, yes.

Q: When you say "small theaters," do you mean theaters for less than 300 patrons?

A: Correct.

Q: Did there ever come a time when your advice with respect to 4.33.3's application to stadium-style theaters changed?

A: It would have been in '97. It would have been around the time of the Florida charrette.

Q: Can you describe what the Florida charrette was?

A: An attempt by advocates to meet with the movie industry and the movie industry's designers to see what could be done about creating better seats for wheelchair spaces in stadium-style cinemas.

Q: One more question on theaters for more than 300 patrons.

Can you tell me — you said that, in response to one of my questions, that you gave advice that was consistent with the way I had asked the question.

Appendix O

What is your recollection of the advice that you gave with respect to where you put the wheelchair seats in a stadium-style theater that is being built for more than 300 people? And this is in the time frame of '95,'96.

A: Again, I don't remember a specific discussion, but it would have been something to the effect of "You've got to put them in more than one place. Do not just imagine that back left and back right suffices. If you're going to put some in the back, then try and get some towards. the middle or front of the room."

Q: So you could not have them in just one location?

A: That's correct. That's this essence of dispersion.

Q: And with respect to smaller theaters, those under 300, you could have them in one location?

A: That's correct.

* * *

Q: By the way, the date of the second page of this exhibit is September 12,'97.Tbe date of the first page is a little blurry. It could be December 13 or 17 — I can't tell — 1997. So let me just rephrase the question here.

Do you recall speaking to Bob Carasitti around September 12,1997, with respect to a changed view that you were conveying concerning 4.33.3 subsequent to the Florida charrette?

Appendix O

A: Not with great specificity, but I do remember we had the discussion, correct.

* * *

Q: Did there come a time when the advice that you were giving with respect to Section 4.33.3's application to stadium-style theaters changed yet again?

A: Yes.

Q: When was that?

A: In 1998, summer, early autumn, somewhere in that area.

Q: And what was the reason that the advice changed again?

MR. PINEAULT: At this point if that reason pertains to internal DOJ or Access Board communications, I instruct the witness not to answer.

A: It had to do with a brief that was filed.

* * * *

APPENDIX P — BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF ARCHITECTS IN SUPPORT OF CINEMARK USA, INC. AND SEEKING REVERSAL DATED JUNE 3, 1999

NO. 99-50204

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH COURT

JOSE G. LARA, E.J. LOZANO, ALFREDO JUAREZ, G. TIM HERVEY, EARL L. HARBECK, VOLAR CENTER FOR INDEPENDENT LIVING, LUIS ENRIQUE CHEW, DESERT ADAPT, MYRA MURILLO, MARGARITA LIGHTBOURNE-HARBECK,

Plaintiffs-Appellees,

v.

CINEMARK, USA, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
El Paso Division
Civil Action No. EP-97-CA-502-H
Honorable Harry Lee Hudspeth,
United States Chief District Judge

BRIEF OF AMICUS CURIAE
AMERICAN INSTITUTE OF ARCHITECTS

In Support of Cinemark USA, Inc.
and Seeking Reversal

Appendix P

Jeffrey T. Kubes
Martin J. O'Hara
QUINLAN & CRISHAM, LTD.
30 N. LaSalle Street, Suite 2900
Chicago, IL 60602
Telephone: (312) 263-0900
Facsimile: (312) 263-5013

ATTORNEYS FOR AMICUS CURIAE
AMERICAN INSTITUTE FOR ARCHITECTS

Appendix P

INTEREST OF AMICUS

The American Institute of Architects ("AIA"), headquartered in Washington, D.C., is a national organization representing 63,000 architects across the country. AIA members comprise a broad cross-section of architects responsible for the design and construction of many types of structures that require compliance with the ADA.

The AIA supports the purposes of the ADA statute for Americans with disabilities and expanding the opportunities for fulfillment for persons with disabilities has long been a part of AIA's public policy. AIA seeks leave in this appeal to apprise this Court of one aspect of the District Court's opinion which adversely affects architects. The District Court read the certification of codes process provided by the ADA out of the statute. That process, established by Congress, provides a means by which federal, state and local governments can work together to ensure that architects, builders and building owners can determine, from the beginning, how to comply with ADA requirements. In order to obtain compliance with the ADA, its statutory requirements must be understandable and achievable. Thus, the certification process provides a smooth and workable method to assure that the buildings that are constructed are accessible, avoiding the inefficiencies and delays imposed by litigation and retrofitting. With the evolving nature of the ADA, the certification process is currently the only means available for architects to ensure that they are acting in accordance with ADA requirements, thereby providing a safe harbor from liability. Without that process, architects will be frustrated in their ability to develop building designs that comply with the ADA and achieve Congress' goals with respect to accessibility.

Appendix P

INTRODUCTION

Architects have no stake in which specific requirements are imposed by the ADA. An architect does not have an interest in whether the ADA requires one wheelchair accessible seat or one hundred wheelchair accessible seats in a facility.[1] Architects can develop their designs to comply with ADA requirements. However, architects can only do so if they can determine with certainty what requirements the ADA imposes for the facilities they are designing.

State and local governments have long used a very workable method for obtaining compliance with their building and fire codes. Prior to obtaining permits for construction, the architect provides the code official with the plans and specifications for the project to allow the official to determine whether the proposed project complies with all applicable rules and regulations. When an aspect of the design is found not to comply with the requirements, the architect can alter the plans and specifications to address the noncompliance.

Similarly, during the construction phase of the project, code officials inspect the facility to determine compliance requirements. This allows the official to physically see the project and analyze the facility relative to building accessibility requirements. Most importantly, the official can meet with the architect to address any problems or questions,

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1. The focus of the AIA is not how Texas Accessibility Standards section 4.33.3 is interpreted in the context of stadium style theaters. It is only important that architects know what the proper interpretation is in order to design facilities in compliance with section 4.33.3.

and can make compliance decisions based upon a personal review of the actual facility.

The federal government does not have these types of mechanisms in place. The Department of Justice ("DOJ"), the agency charged with enforcing the ADA, does not have a system in place whereby architects may consult with DOJ regarding issues specific to a single project. DOJ's informal technical assistance line fields calls regarding ADA issues, but its advice is general and not legally binding on the agency. Thus, architects, even if they submit plans and specifications to DOJ, cannot obtain a finding that they meet the relevant ADA requirements, or do not meet requirements in identified ways. DOJ does not undertake inspections during the construction process to ensure that the facility is being constructed pursuant to all applicable ADA requirements. Rather, the only time DOJ evaluates a facility to determine ADA compliance is after a complaint has been filed, or an investigation has been undertaken. By that time, the facility may be finished or at least too far along to prevent wasteful construction and reconstruction, and may result in compromises that provide less perfect access than would have been possible if determined at an earlier stage.

The drafters of the ADA had the foresight to provide a means by which architects and builders who design could ensure that their designs complied with ADA regulations, by relying on the estimated 40,000 state and local building code enforcement systems. The certification provision, 42 U.S.C. § 12188(b)(1)(A)(ii), establishes that state and local entities may obtain certification from the Attorney General that their building codes meet or exceed the requirements of the ADA.

Architects may, therefore, receive guidance as to the appropriate choices for a certain facility, both before and during construction. When certification has been granted by the Attorney General, a facility found to be in compliance with the certified local or state accessibility standards is necessarily in compliance with the corresponding ADA requirements.[2] Architects whose plans and specifications have been approved under the certified building code should thus be assured that they will not later be found liable for failing to design a facility that is ADA compliant.

Here, the Texas Accessibility Standards ("TAS") were granted certification by the Attorney General in 1996, and Cinemark had been found to comply with that code. Both state and local officials had determined that the Tinseltown facility complied with TAS, and thus necessarily the ADA.[3] Nonetheless, the District Court found Cinemark not in compliance with the ADA. In doing so, the District Court eviscerated the certification provision. If the District Court's decision is affirmed, architects, builders and building owners are left in the position of having no degree of certainty, and Congress' certification provision is rendered meaningless.

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2. It is important to note that certification is not effective "if an official either waives an accessible element or feature or allows a change that does not provide equivalent facilitation." 28 C.F.R. pt. 36, app. B. Thus, any concern that a local code official may simply waive an applicable requirement has already been addressed. No such issue was raised by plaintiffs below.

3. It was undisputed that the requirements of section 4.33.3 of TAS are more stringent than the requirements found in section 4.33.3 of the ADAAG. *Compare* TAS § 4.33.3 *with* ADAAG § 4.33.3.

AIA therefore requests that this Court give effect to the certification process of the ADA, and reverse the judgment entered against Cinemark by the District Court.

ARGUMENT

I. The Enactment Of The ADA And The Certification Process.

Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(l). In drafting Title III regarding the construction and operation of public accommodations, however, Congress intentionally "painted with a broad brush" and then required the Attorney General to promulgate regulations to implement the ADA. *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 707 (D. Or. 1997). The Attorney General was directed to issue regulations consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board. 42 U.S.C. § 12186(c).

Although ADAAG was created in 1991 as mandated by Congress, it was recognized at the inception of the ADA that the most effective enforcement of the ADA would be through compliance by builders and architects from the design phase forward. It was further recognized that compliance would best be achieved by encouraging states to adopt building codes which contained requirements at least as stringent as the ADA requirements. Where a state adopted a building code which set forth requirements equivalent to the ADA and this

is certified by DOJ, architects could then be assured of compliance with the ADA by complying with the certified code.

To achieve this result, a certification procedure was enacted which encouraged states and local entities to seek certification of their building codes by the Attorney General. Under the certification process, a building code will be certified where the "code meets or exceeds the minimum requirements of the [ADA] for the accessibility and usability of places of public accommodation and commercial facilities." 28 C.F.R. § 36.602. To guarantee the integrity of certification, a stringent process was put in place which includes the submission of a formal application seeking certification, as well as public hearings both at the state or local level, and in Washington, D.C. 28 C.F.R. § 36.603. Moreover, because the certification process was intended to be a substantive review of the state or local building code, the statute is designed to provide certain protections when the Attorney General has granted certification at the conclusion of the process finding that a state or local building code meets or exceeds the minimum requirements of the ADA:

> a[t] any enforcement proceeding under title III of the Act, such certification shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of title III.

28 C.F.R. § 36.602.

Appendix P

II. DOJ Has Recognized The Importance Of The Certification Process.

In identifying the purpose of the certification process DOJ has stated:

> It allows builders to rely on their local inspection processes . . . . It allows builders to be assured of compliance through inspections early in the construction process, when mistakes can be corrected relatively easily and cost-effectively. It eliminates conflicts between local requirements and ADA requirements. Finally, by incorporating ADA-equivalent accessibility provisions into the local code, certification gives building officials a significant role in enforcing the substance of the ADA. By meshing local processes with Federal requirements, certification makes accessibility part of the process, not an afterthought.

(R. 319). Moreover, Bill Lann Lee, Acting Assistant Attorney General of the Civil Rights Division, recently testified before the Subcommittee on the Constitution that he is a "big fan" of code certification because knowing and following the standards up front allows people to comply with the ADA. (*See* Exhibit A, p. 3).

Knowing from the beginning of a project how the standards apply is crucial for architects. Because of the intentionally broad language of the ADA and its implementing regulations, the application to a specific facility

is often difficult to determine.[4] The certification process provides a means for architects to determine in advance whether they are in compliance. As DOJ proclaimed in 1996 when Texas became only the second state to receive certification, "Everyone in the state of Texas — builders, *architects*, business owners, and the general public — will benefit from Texas' new accessibility standards . . . Certification makes it easier to comply with the law." (R. 320) (emphasis added).

In addition, the certification process was intended to reduce the need for ADA litigation involving builders and architects. By allowing local code inspectors to determine compliance issues early in the process, changes necessary to fully comply with the ADA requirements can be made more easily, and less expensively. (*See* DOJ press release of December 12, 1997, attached hereto as Exhibit B). Architects were informed that they would be entitled to "additional legal protection if they built in compliance with the certified code, but are later sued under the ADA." (*See* DOJ press release of May 27, 1998, attached hereto as Exhibit C). Thus, DOJ's position was that approval by Texas' state and local code officials would constitute a strong defense for architects if there were later complaints of discrimination. Certification,

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4. This case provides the perfect example. Although AIA takes no position as to the proper interpretation of section 4.33.3 here, it is important to note that DOJ never provided an interpretation of section 4.33.3 of the ADAAG in the context of stadium style theaters until this litigation was filed by plaintiffs. Cinemark therefore relied-upon the interpretation of the state and local code officials who determined that Tinseltown complied with section 4.33.3 of TAS. (R. 456, 516, 1723).

therefore, was intended as a safe harbor for architects who attempted to comply with the requirements of the ADA by working with local code officials.

III. The Decision Below Eviscerates The Purpose And Consequences Of The Certification Process.

In complete disregard for the certification process provided by Congress and the goals of DOJ to provide architects with a safe harbor, the District Court disregarded the certification of TAS by the Attorney General and the determinations by state and local code inspectors that Cinemark complied with TAS. Plaintiffs had argued these were of absolutely no relevance. Further, plaintiffs did not dispute the evidence establishing that Tinseltown was found to be in compliance with all TAS requirements.

That evidence showed that prior to the construction of the facility, the plans and specifications for the Tinseltown complex were reviewed by Harry Manley, a plan reviewer for the City of El Paso. Manley had attended the Texas "Accessibility Academy" training course and passed the required examination with a score of 80 or better. (R. 321). Upon his review of the plans and specifications, Manley granted conditional approval for the project subject to certain revisions not applicable here. Notably, as to TAS section 4.33.3, Manley found that the plans and specifications submitted by Cinemark were in compliance with the requirements at issue in this case. (R. 516). In accordance with El Paso's duties as a Municipal Service Provider, Manley also submitted his conditional approval to the Texas Department of Licensing and Regulation. (R. 322). Manley

testified unequivocally that based on his experience and training, it was his opinion that the plans for Tinseltown complied with TAS section 4.33.3. (R. 506).

Furthermore, James Sheffield, a professional engineer and Independent Contract Provider for the State of Texas, conducted a full inspection of the facility during the construction process. (R. 322). Upon the completion of his inspection, Sheffield prepared a letter to Mr. Don Harton of Cinemark including a copy of his report. (R. 449-459). The report detailed the findings of the inspection, including the facility's compliance, or lack thereof, with various TAS requirements. Like Manley, Sheffield determined that the placement of wheelchair locations at Tinseltown complied with section 4.33.3. (R. 456). Sheffield also conducted a second inspection and again found that Tinseltown complied with section 4.33.3. (R. 1723). Thus, both before and during the construction process, Cinemark was specifically informed that its facility was in compliance with TAS section 4.33.3, and therefore necessarily met or exceeded the requirements of the ADA at issue in this case.[5]

Disregarding DOJ's expressed views that the certification process was intended to limit litigation, plaintiffs contended that the proper procedure for addressing these issues was

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5. The record also establishes that Cinemark worked with other code officials to ensure that Tinseltown complied with TAS and the ADA. Terry Lee Williams, the deputy Director for Building Services for El Paso, testified that he met with representatives from Cinemark on at least four occasions to discuss compliance issues. (R. 465). As with Manley and Sheffield, Williams was also of the opinion that Tinseltown complied with TAS section 4.33.3. (R. 472).

through a suit by Cinemark against the city and state. Specifically, plaintiffs stated:

> If the City and/or the State had some obligation to help Defendant meet its duty to comply, and either of [sic] both of those entities failed to meet their obligation, Defendant can bring a separate action against those entities, or could have cross claimed against them in this case.

(R. 801). Plaintiffs thus actually advocated additional litigation, as opposed to advancing one of the goals of certification: reducing litigation through compliance by architects and owners/developers. Clearly, however, litigation against code officials is not a purpose Congress sought to further through the certification process.

Even though the record contained unrefuted evidence that TAS had been certified as meeting or exceeding the ADA requirements, and that Tinseltown had been found to be in compliance with TAS, the District Court granted summary judgment in favor of plaintiffs without even addressing the effect of the Attorney General's certification of TAS, (R. 1259-63), although under the plain language of the ADA, the certification of TAS constituted *rebuttable evidence* that Cinemark complied with the ADA requirements. 28 C.F.R. § 36.602.

By ignoring the presumption granted to an architect who complied with a certified code, and granting judgment for plaintiffs, the District Court necessarily determined that government-determined compliance with the certified

building code was irrelevant. That decision is inconsistent with the terms and intent of the ADA. It effectively nullifies the certification process and undermines Congress' plan to encourage voluntary compliance with the ADA. In fact, the District Court's decision ensures voluminous litigation against architects, even when local code officials inform the architect that the facility complies with a certified statute.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

AMERICAN INSTITUTE
OF ARCHITECTS

By: _____
One of Its Attorneys

Jeffrey T. Kubes
Martin J. O'Hara
QUINLAN & CRISHAM, LTD.
30 N. LaSalle Street, Suite 2900
Chicago, Illinois 60602
312/263-0900

APPENDIX Q — PETITION FOR RULEMAKING DATED AUGUST 24, 1999

THE UNITED STATES DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
DISABILITY RIGHTS SECTION

In the Matter of

NATIONAL ASSOCIATION OF THEATRE OWNERS,

Petitioner.

Petition for Rulemaking
Re: Stadium-Style Motion Picture Theatres
Docket No. _____

Pursuant to 5 U.S.C. § 553(e), the National Association of Theatre Owners ("NATO") respectfully petitions the Department of Justice ("Department") to promulgate a lawful rule for the placement of wheelchair spaces in "stadium style" motion picture theatre auditoriums which conforms to the requirements of Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181, *et seq.* ("ADA") . Under 5 U.S.C. § 553(b) and (c), issuance of the rule requested herein must be preceded by, *inter alia*: (1) adequate notice of the proposed rule published in the Federal Register and (2) the opportunity for interested persons, such as NATO, to "participate in the rule making through submission of written data, views, or arguments. . . ."

Appendix Q

Stadium style motion picture theatres are intended to enhance the movie viewing experience by providing seating on tiered risers. Stadium-style motion picture theatres are a recent but especially popular trend because they offer all patrons an unobstructed view of the screen. In exchange, a substantial portion, if not all, of the theatre auditorium is characterized by chairs located on continuous risers that vary from 2 inches to 18 inches in height, depending on the design of the theatre. To reach the seats within such an auditorium, patrons have to climb stairs rather than walk up sloped aisles typical of older theatres. This situation presents obvious difficulties for wheelchair locations. In order to fulfill the objectives of the stadium-style design in a manner consistent with the requirements of Title III, several factors must be analyzed and considered. The objectives of the ADA must be synthesized with the practical and safety limitations inherent in the nature of this type of seating arrangement.

The rulemaking requested herein is called for because neither the ADA nor the regulations promulgated thereunder specify the location in which wheelchair spaces must be placed in stadium style motion picture theatre auditoriums. Stadium-style seating was not common in theatres when the ADA and the regulations were under consideration and location of wheelchair seating in such theatres was not addressed by the Congress or any of the parties involved in the development of ADA regulations. Before the Department adopts, advocates and seeks to enforce a position regarding the placement of such wheelchair spaces, it must permit the issue to be appropriately reviewed, considered, analyzed and otherwise "vetted" through the notice-and-comment

procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553.

In derogation of this requirement, the Department has already adopted and is attempting to enforce one or more rules which require operators of stadium style movie auditoriums to locate wheelchair spaces in areas that provide the patron with: 1) a "vertical viewing angle" that is equal to or less than the ***median*** vertical viewing angle for all of the seats in the auditorium (hereafter, "Median Vertical Viewing Angle Rule"; 2) a "horizontal viewing angle" that is equal to or better than the ***median*** horizontal viewing angle for all of the seats in the auditorium (hereafter, "Median Horizontal Viewing Angle Rule"; or (3) both. Neither the Median Vertical Viewing Angle Rule nor the Median Horizontal Viewing Angle Rule is set forth in the ADA or the regulations duly promulgated thereunder. The Median Vertical Viewing Angle Rule is based, at least in part, on a purported industry "guideline" which predated stadium style seating in theatres, represents lofty objectives rather than actual practice, and was not subject to the review and scrutiny of the notice and comment procedures under the APA. Petitioner respectfully submits it is incumbent upon the Department to void its improperly adopted Median Vertical Viewing Angle Rule and Median Horizontal Viewing Angle Rule and to replace them with a rule lawfully promulgated in compliance with the APA's prior-notice-and-comment requirements.

Appendix Q

I. BACKGROUND

Petitioner NATO

Headquartered in North Hollywood, California, NATO is the national trade organization of the motion picture theatre industry. NATO is the largest trade association of motion picture theatres in the world, and its members currently operate over 19,000 motion picture screens located in all of the 50 states. A list of current NATO members is provided in Exhibit A hereto. Many NATO members currently operate stadium style movie theatres and/or are in the process of constructing such theatres. NATO members have sought in good faith to comply fully with the requirements of Title III in designing and constructing the stadium style auditoriums. However, they have been faced with conclusory, vague, untested, unfounded, unsubstantiated, confusing and inconsistent pronouncements, indications and statements of position by the Department, the courts and various advocacy rights groups throughout the country regarding the appropriate placement of wheelchair locations in stadium style auditoria. Several NATO members currently face actual or threatened private and government lawsuits and investigations challenging the wheelchair seating in their existing or proposed stadium style theatres. This patchwork of enforcement efforts is leading to an array of inconsistent interpretations and pronouncements by courts regarding the application of Title III to stadium style seating arrangements.

NATO has standing to pursue this Petition on behalf of its members because (1) its members would otherwise have sanding in their own right; (2) the interests which NATO

seeks to protect are germane to the purpose of NATO; and (3) the Department can provide the relief requested by NATO without requiring the participation of individual members of NATO.

Promulgation of the ADAAG

In enacting Title III of the ADA, Congress specifically designated the Attorney General and the United States Architectural and Transportation Barriers Compliance Board ("Access Board")[1] to promulgate the standards to be used in administering and enforcing Title III. Section 12186(b), 42 U.S.C., provides that "[n]ot later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of" Title III, including "standards applicable to [public accommodation] facilities. . . ." Congress also mandated that the Access Board issue minimum guidelines to implement Title III of the ADA. 42 U.S.C. § 12204.

In accordance with the ADA, the Access Board issued the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"). See 56 Fed. Reg. 35,408 (1991) (codified at 36 C.F.R. pt. 1191 (App. A). The Access Board promulgated its guidelines in accordance with APA notice-and-comment procedures. On the same day that the ADAAG was issued,

1. Originally, Congress created the Access Board to insure compliance with the Architectural Barriers Act of 1968, 42 U.S.C. § 4151, which governed accessibility to federally funded buildings. *See* 29 U.S.C. § 792. In 1992, Congress amended 29 U.S.C. § 792 to include an additional function for the Access Board – develop advisory guidelines for Titles II and III of the ADA. See 29 U.S.C. § 792(b)(2).

the Department adopted the ADAAG as its own regulations, entitled the Justice Department's Standards for Accessible Design ("JDSAD") (codified at 28 C.F.R. pt. 36 App. A).

ADAAG Standard 4.33.3

The ADAAG predated the advent of stadium style movie theatres. Accordingly, it contains no specific rule or guidance as to the location of wheelchair spaces in such theatres. Under "Standard 4.33.3" of the ADAAG, in auditoriums of less than 301 seats, or auditoriums of any size having sight lines that require slopes of greater than 5 percent, wheelchair seating may be "clustered" in a single location of the theatre. 28 C.F.R. Ch. I, Pt. 36, App. A, § 4.33.3. Where a single "cluster" of wheelchair seats is permitted, the regulations do not specify a precise location where builders must place the single cluster of seats, other than that they must adjoin an accessible route of egress. Standard 4.33.3 states, in pertinent part:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. . . . When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location.

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> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

When Standard 4.33.3 was adopted motion picture theatres had sloped floors, one ticket price, and there were no reserved seats. In movie auditoria of under 301 seats, wheelchair locations could be placed in one location. The industry believed that the term "lines of sight" related to the ability of a patron to see over the head of the person in the rows in front.

Standard 4.33.3, like the ADA itself, makes no reference to a "vertical viewing angle" or a "horizontal viewing angle." It certainly does not purport to prescribe the maximum vertical or horizontal viewing angle that may be offered to wheelchair users in movie theatres. There also is no requirement set forth in Standard 4.33.3 that wheelchair locations receive a vertical or horizontal viewing angle that is equal to or less than the "median" viewing angle for all patrons in the auditorium. Nor is there evidence that either the Department or the Access Board intended that Standard 4.33.3 impose a maximum vertical or horizontal viewing angle requirement for movie theatres. Indeed, the requirement that wheelchair users receive "a choice of admission prices and lines of sight comparable to those for members of the general public" appears to have been aimed not at small movie theatres, but rather at large venues such as sports

stadiums and concert halls which have multiple ticket prices and reserved seats.[2]

The Median Vertical Viewing Angle Rule

Prior to the Summer of 1998, the Department had interpreted Section 4.33.3 in the context of movie theatres but had never required wheelchair seating positions to be located in a particular location of an auditorium to comply with the law. To the contrary, the Department had assured theatre owners and industry groups that, in theatres of 300 seats or less, wheelchair seating areas could permissibly be placed anywhere in the theatre under Section 4.33.3.

However, in July 1998, the Department filed an *amicus curaie* brief in an ADA action pending in El Paso, Texas which reflected an entirely new position by the Department that cannot be found in the language of the ADA or Standard 4.33.3. In its brief in *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H (W.D. Tex. July 20, 1998), the Department pronounced that "in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats ***within the range of viewing angles as those offered to most of the general public*** in the stadium style seats, adjusted for seat tilt." Brief, at 8 (emphasis added). The Department subsequently clarified its position to require, at a minimum,

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2. For example, if a baseball park offers seats (1) behind home plate, (2) behind first base, (3) behind third base, (4) at a "club" level and (5) around the outfield, the requirement that wheelchair receive "a choice of admission prices and lines of sight comparable to those for members of the general public" insures that the wheelchair users will be offered seating in multiple locations.

that wheelchair placements in stadium style theatres provide such viewers a vertical "viewing angle" to the screen that is at least as good as the "median" viewing angles in the auditorium.

The Department bases its Median Vertical Viewing Angle Rule at least in part, on a purported industry "guideline" which was not prepared with stadium style seating in mind, and which has never been subjected to analysis or scrutiny under the APA. In its *amicus* brief in *Lara*, the Department specifically pointed to the "SMPTE Engineering Guideline Design of Effective Cine Theaters, EG 18-1994" ("SMPTE Guideline"). The SMPTE Guideline was initially issued by the Society of Motion Picture and Television Engineers ("SMPTE") in the 1970s, well before the first stadium style motion picture theatre was in operation. Brief, at 3-4. In its brief, the Department cited, *inter alia*, the following as conclusions in the SEMPTE Guideline:

- "physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds +35 degrees";
- "[p]hysical discomfort also occurs when the horizontal line of sight exceeds +15 degrees in either direction";
- "the 'optimum viewing zone' is from horizontal at eye level (0 degrees) to -30 degrees"; and
- "to avoid excessive vertical viewing angles and to bring the vertical angle closer to zero degrees, seat backs should be tilted the same amount, 12 to 15 degrees."

These "conclusions" were never subjected to the prior-notice-and-comment procedures of the APA.

The Median "Horizontal Viewing Angle" Rule

In addition to applying the Median Vertical Viewing Angle rule, the Department also has taken the position that wheelchair placements in stadium style theatres must provide a "horizontal viewing angle" which is equal to or better than the median "horizontal viewing angle" in the auditorium. Petitioner is not aware of any purported basis upon which the Department has relied in developing and applying this Rule.

The ADAAG Manual

In May of this year, the Access Board issued an "ADAAG Manual" which it refers to as a "guide to the Americans with Disabilities Act Accessibility Guidelines." The ADAAG Manual states that in construing and applying Section 4.33.3, "[s]ight lines are calculated according to certain industry conventions and practices." Manual, at 117. Moreover, the Manual contains a diagram of four recommended audience wheelchair placements for a public auditorium. Manual, at 118. Only one of the four placements recommended by the Access Board would comply with the Department's Median Vertical Viewing Angle Rule or Median Horizontal Viewing Angle Rule.

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II. A NOTICE AND COMMENT RULEMAKING IS REQUIRED

The Department's Median Vertical Viewing Angle Rule and Median Horizontal Viewing Angle Rule constitute "rules" under the APA; therefore, prior notice and an opportunity for comment by the public were a prerequisite to the adoption of each such rule. Under the APA, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4). A rule promulgated by an agency that is subject to the APA is invalid unless the agency first issues a public notice of proposed rulemaking which describes the substance of the proposed rule, and gives the public the opportunity to submit written comments; and if after receiving the comments it decides to promulgate the rule the agency must set forth the basis and purpose of the rule in a public statement. 5 U.S.C.§§ 553(b), (c). Public participation in rule-making is necessary to "allow the agency to benefit from the experience and input of the parties," *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978); and to "enable[] the agency . . . to educate itself before establishing rules and procedures which have a substantial impact on those regulated," *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3rd Cir. 1969).

Although the APA's procedural requirements apply to "legislative" (or "substantive") rules and not to "interpretive rules," the determination of the maximum allowable vertical viewing angle for wheelchair placements in movie theatres certainly qualifies as a "legislative" rule. In its recent opinion

in *Caruso v. Blockbuster-Sony*, *supra*, the Third Circuit found that the Department had improperly engaged in legislative rulemaking in connection with its efforts to apply Standard 4.33.3 to the issue of whether wheelchair users are entitled to an unobstructed view over standing spectators. The court emphasized that if the Department believed "that the ADA should be interpreted to require that wheelchair users be given lines of sight equivalent to standing patrons . . . the [Department] can accomplish this end through notice-and-comment rulemaking." 1999 WL 185040 *9. As the trial court in Caruso explained:

> Congress has elected to pass a very general statute and leave it to the regulatory process to fill in the necessary details. Constructing a stadium or arena is an expensive, complex affair. If the law is to impose requirements to assist those with disabilities and to impose an obligation to make expensive retrofits if that law is violated, it is essential that those requirements be clearly articulated in the regulations. Compliance with APA rulemaking insures, hopefully at least, that all points of view are heard and that the resulting regulation provides concrete guidance to those embarking on such a Project.[3]

Stadium style seating movie theatres are also expensive and complex facilities and it is essential that all requirements for the construction of such facilities "be clearly articulated in

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3. *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 968 F. Supp. 210, 216 (D.N.J. 1997), *aff'd in part, rev'd in part*,__ F.3d __, 1999 W 185040 (3rd Cir. April 6, 1999).

. . . regulations" duly promulgated under the APA in a manner that insures that "all points of view are heard. . . ." *See also Independent Living Resources*, *supra*, 982 F. Supp. at 736 n. 55 ("the notice and comment requirement would be eviscerated if the [Department of Justice] could create new obligations simply by announcing a new interpretation of an existing regulation").

That prescription of a specific vertical or horizontal viewing angle for wheelchair placements constitutes legislative rulemaking is demonstrated by the opinion by Judge Posner in *Hoctor v. United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996). In *Hoctor* the Department of Agriculture was tasked with enforcing the Animal Welfare Act, 7 U.S.C §§ 2131 *et seq.*, with respect to the keeping of exotic animals. The Act was silent as to the height requirement for fences used to house such animals. Following notice and comment, the Department promulgated a regulation entitled "structural strength." This regulation required facilities housing such animals to be "constructed of such material and of such strength as appropriate for the animals involved" and to be "structurally sound." 9 C.F.R. § 3.125(a). However, as with the statute, the regulation contained no express requirement that perimeter fences be a particular height. Nevertheless, the Department issued and enforced an internal memorandum which provided that all dangerous animals must be inside a perimeter fence at least 8 feet high.

The Seventh Circuit held that the "internal memorandum" constituted a legislative rule which required notice and comment to be effective. The court stated: "Even if . . .

the eight-foot rule is consistent with, even in some sense authorized by, the structural-strength regulation, it would not necessarily follow that it is an interpretive rule. *Id.* at 170. The court explained that in order to be an interpretive rule, a rule must be "derived from the regulation by a process reasonably described as interpretation." *Id.* The court classified the 8-foot rule as "arbitrary" (not in the "arbitrary or capricious" sense) but because it represented "an arbitrary choice among methods of implementation." The court emphasized that:

> ***A rule that turns on a number is likely to be arbitrary in this sense.*** There is no way to reason an eight-foot perimeter-fence rule as opposed to a seven-and-a-half foot fence or nine-foot fence or a ten-foot fence. None of these candidates for a rule is uniquely appropriate to, and in that sense derivable from, the duty of secure containment. This point becomes even clearer if we note that the eight-foot rule actually has another component – the fence must be at least three feet from any animal's pen. Why three feet? Why not four? Or two?

Id. (emphasis added). The court further stated that "[w]hen agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive and require notice and comment rulemaking, a procedure that is analogous to the procedure employed by legislatures in making statutes." *Id.* at 170-71. The court also stated that the rule was "arbitrary in the sense that it could well be different without significant impairment of any regulatory

purpose." *Id.* at 171; *see also Carlisle Tire & Rubber Co. v. United States*, 634 F. Supp. 419, 423 (CIT 1986) (Department of Commerce engaged in legislative rulemaking by adopting a position that antidumping margins of 0.5% or less were "de minimis").

Judge Posner's opinion in *Hoctor* succinctly demonstrates *why* the Department's Median Vertical Viewing Angle Rule and Median Horizontal Viewing Angle Rule constitute legislative rulemaking. To require movie theatres to provide wheelchair placements with viewing angles the same or less than the median vertical or horizontal viewing angle represents an arbitrary choice among methods of implementing the "lines of sight comparable" requirement of Standard 4.33.3. As with the 8-foot perimeter rule in *Hoctor*, the Department's rule is "arbitrary in the sense that it could well be different without significant impairment of any regulatory purpose." Why is the rule based on the "median" average rather than the "mean" average? How does one properly measure vertical and horizontal viewing angles in the context of a motion picture theatre? There is a significant question as to whether a vertical and horizontal viewing angle test, as defined by the Department of Justice, is the appropriate way to measure line of sight in a movie theatre. In short, there are several factors to consider in determining whether a particular "line of sight" is "comparable." It was clearly arbitrary for the Department to determine that comparability of lines of sight must be achieved through a vertical and/or horizontal viewing angle based on the median viewing angle.

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In *Hoctor*, the Agriculture Department's enforcement of an internal policy adopted without notice and comment caused "some unknown fraction" of the thousands of animal dealers in the U.S. to "face the prospect of having to tear down their existing fences and build new, higher ones at great cost." 82 F.3d at 171. The agency was admonished to "listen to" the concerns of such dealers "before settling on a final rule" which imposed a perimeter fence height requirement. Similarly here, there are hundreds of movie theatres across the country whose operators now face the prospect of having to redesign existing theatres at great cost. The Department should not be permitted to impose a specific vertical or horizontal viewing angle requirement for wheelchair placements in movie theatres until after the Department has "listened to" the concerns of such operators.

This is especially true given that the Department's new "Median Vertical Viewing Angle Rule" and "Median Horizontal Viewing Angle Rule" are inconsistent with the Department's prior pronouncements. Until its amicus brief in *Lara*, the Department had maintained that wheelchair seating in theatres of 301 seats or less could be anywhere in the general seating requirement of the auditorium, as long as the patron's view was not obstructed. The Department also had taken the position that wheelchair locations near entranceways were ideal, especially in auditoriums of any size having sight lines that require slopes of greater than 5 percent, as provided in the plain language of section 4.33.3.

Prior notice and comment is especially necessary here because of the Department's reliance upon the SMPTE Guideline for its position that vertical viewing angles should

not exceed 35 degree. The SMPTE Guideline does not purport to portray custom in the movie theatre industry - but rather, a lofty objective. ("Good design has often been compromised by practical solutions and the belief that effective cinemas are not economically feasible"). Moreover, such a study should be subjected to the scrutiny of the notice and comment process.

"An agency's denial of a fair opportunity to comment on a key study may fatally taint the agency's decisional process." *National Association of Regulatory Utility Commissioners v. FERC*, 737 F.2d 1005 (1984), *cert. denied*, 469 U.S. 1227 (1985) (agency's denial of fair opportunity to comment on a key staff study may fatally taint the agency's decisional process); *United States Lines, Inc. v. FMC*, 584 F.2d 519, 534 (D.C. Cir. 1978) ("we have required information in agency files or reports identified by the agency as relevant to the proceeding to be disclosed to the parties for adversarial comment. . . . Such requirements . . . ensure that parties to agency proceedings are afforded the opportunities guaranteed by statute meaningfully to participate in those proceedings. . . ."). In *Idaho Farm Bureau, Federation v. Babbitt*, 58 F.3d 1392, 1403-04 (9th Cir. 1995), the Fish and Wildlife Service violated the APA by relying extensively on a provisional report not subjected to public notice and comment. The court stressed that the "necessity for notice and opportunity to comment on the USGS study was greatly heightened because [the agency] relied largely on the USGS study to support its final rule," and that "[o]pportunity for public comment is particularly crucial when the accuracy of important material in the record is in question." *Id.* at 1403.

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Finally, the need for a formal rulemaking is further mandated by the fact that the Department's Median Vertical Viewing Angle Rule and Median Horizontal Viewing Angle Rule are contrary to the Access Board's "ADAAG Manual." Although the Manual states that "industry conventions and practices" should be looked to in complying with Section 4.33.3, there is no indication that the Department has done so in adopting and enforcing its rules. In addition, the Manual recommends wheelchair placements for public auditoriums which almost uniformly would fail to meet the requirements of the Department's rules. Such inconsistencies with the pronouncements of the Access Board further demonstrate why the Department needs to subject its rules for wheelchair placements in stadium style movie theatres to the notice and comment procedures mandated by the APA.

III. CONCLUSION

For the reasons set forth above, Petitioner NATO, on behalf of its members, respectfully requests that the Department replace its improperly adopted Median Vertical Viewing Angle Rule and Median Horizontal Viewing Angle Rule with a new, lawful rule regarding the placement of wheelchair spaces in stadium style seating auditoriums promulgated in compliance with the prior-notice-and-comment requirements of the APA. Attached hereto as Exhibit B, is a proposed rule that NATO believes effectively meets the requirements of the ADA.

Appendix Q

Respectfully submitted,

GALLAND, KHARASCH, GREENBERG
FELLMAN AND SWIRSKY, P.C.

s/ Steven John Fellman
M. Roy Goldberg
Canal Square
1054 Thirty-First Street, N.W., Suite 200
Washington, D.C. 20007-4492
(202) 342-5200
(202) 342-5219/Fax

Attorneys for Petitioner National
Association of Theatre Owners

Dated: August 24, 1999

APPENDIX R — LETTER FROM BILL LANN LEE TO STEVEN JOHN FELLMAN DATED APRIL 3, 2000

U. S. Department of justice

Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20530

Steven John Fellman, Esq.
M. Roy Goldberg, Esq.
Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007-4492

Dear Sirs:

The Attorney General has asked me to respond to your petition on behalf of the National Association of Theatre Owners (NATO). NATO is requesting that the Department of Justice promulgate a rule for the placement of wheelchair spaces in "stadium style" motion picture theater auditoriums.

In support of its petition, NATO provided a lengthy memorandum that reiterates the arguments now being made by individual NATO members who are involved in litigation with the Department of Justice. The Department's response to these arguments will be made in the appropriate judicial forums.

Appendix R

However, regardless of the outcome of the pending litigation, the Department is planning to review and amend the Americans with Disabilities Act (ADA) regulations in the next year. As you know, the Architectural and Transportation Barriers Compliance Board (Access Board) has completed a comprehensive review of its ADA Accessibility Guidelines (ADAAG) and has published a Notice of Proposed Rulemaking (NPRM) to update and amend the guidelines. Section 306 of the ADA requires the Attorney General to promulgate regulations that are consistent with the Access Board's minimum guidelines. Consequently, the Department of Justice will issue a NPRM this year proposing to update its ADA Standards for Accessible Design in order to maintain the Standards' consistency with ADAAG. At the same time, the Department will review its title III regulation to clarify a variety of issues. In response to your petition, the Department will consider further clarification of the assembly area seating requirements at that time.

In the meantime, I have shared a copy of your petition for rulemaking with the Access Board so that the Board may incorporate your comments into its rulemaking record.

Sincerely,

s/ Bill Lann Lee
Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

APPENDIX S — DOJ GUIDANCE ON ACCESSIBLE STADIUMS, DATED MAY 1996

Accessible Stadiums

The American with Disabilities Act (ADA) requires **new** stadiums to be accessible to people with disabilities so they, their families, and friends can enjoy equal access to entertainment, recreation, and leisure.

This document highlights key accessibility requirements of the ADA that apply to new stadiums. Other accessibility requirements, such as those for parking lots, entrances, and rest rooms, also apply but these are the same as for other buildings. Compliance with all the accessibility requirements is essential to provide a basic level of access for people with disabilities.

Key Features of Accessible Stadiums

Seating

* * *

- **Whenever more than 300 seats are provided, wheelchair seating locations must be provided in more than one location.** This is known as dispersed seating. Wheelchair seating locations must be dispersed throughout all seating areas and provide a choice of admission prices and views comparable to those for the general public.

Appendix S

- **Wheelchair seating locations must be on an accessible route** that provides access from parking and transportation areas and that connects to all public areas, including concessions, restaurants, rest rooms, public telephones, and exits.

* * * *